PROBLEMS OF COMMUNISM

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SPECIAL ISSUE

Law and Legality in the USSR

The Foundations of Soviet Law
State, Party and Individual
Civil and Criminal Law
The "Popularization" of Justice
The Soviet Lawyer
The Peasant and the Worker
The Family
Developments in China and Eastern Europe

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Law and Legality in the USSR

"The spirit of Soviet law . . . from 1917 to 1921," wrote Professor Harold Berman in an essay published in 1948, "was . . . a spirit of nihilism on the one hand, and of apocalypticism on the other —of ruthless destruction of everything prerevolutionary, and of glorious transition to a new order of equality and freedom without law." This spirit, of course, owed everything to the utopianism of Marxist thought—apotheosized in Lenin's *State and Revolution*—which held law to be an instrument of coercion wielded by the ruling class in the interest of preserving its power over the rest of society. During the transitory period of the "dictatorship of the proletariat," law would be used by the new rulers in order to destroy the enemies of the Revolution. With the disappearance of classes and of the state, law too would disappear.

As we all know, the state in Russia has not disappeared, and the classless society is still as far off now as it was 45 years ago. Nor has there been any sign, of course, of the withering away of law. In fact, there may well have been more laws published in the USSR since the 1920's than in any other modern industrial country. Yet to speak of the administration of justice—or, certainly, of the "rule of law"—in the Soviet Union under Stalin's dictatorship is to mock the very meaning of these terms. Both in the letter and in the spirit, Soviet law has been strictly subordinated to the political will of the Communist Party; it was bent, reinterpreted, employed to justify some the most shocking miscarriages of justice in the 20th Century (*e.g.*, the terror of the 1930's); and it was used to formalize whatever political and social policy the party had been following at any given moment (for case studies see the articles on labor law and family law in this issue).

With the death of Stalin came a revulsion against Stalinism. This revulsion, which soon was translated into concrete political and institutional changes, applied to law as much as to virtually all other sectors of public life in the USSR. The worst abuses of justice were eliminated, and attempts were launched to make Soviet legality not only less arbitrary, but also more humane.

As a number of articles in this issue clearly demonstrate, the path traversed over the past decade or so has not been all forward. Not only have many aspects of Stalinist justice been allowed to remain on the statute books, but new legal institutions, completely at variance with the accepted norms of justice in liberal societies, have emerged in recent years (*e.g.*, see articles by Messrs. Schapiro, Lipson, and Boiter). How the balance sheet of all these developments is to be assessed the reader himself will have to judge. Our aim has been to present what we believe is one of the most important keys to an understanding of Soviet society past and present—as well as of the trends that will determine its future.

—The Editors

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Prospects for the Rule of Law

By Leonard Schapiro

The death of Stalin set in motion a great wave of enthusiasm—in words, if not in deeds—for the reform of Soviet law. In fact, the fashion for "liberalism" in law reform considerably antedated the official denunciation of Stalin in 1956. But concrete results were rather slower to materialize than some of the promises had suggested. Even so, the special powers of the MVD were abolished in 1953; the powers of the procurators were extended and redefined in 1955; and in 1958 the long-awaited new codes of criminal law and procedure were initiated with the enactment by the Supreme Soviet of the "Fundamental Principles" on which they were to be modelled. These "Fundamental Principles," though far from perfect, were a very considerable improvement on anything hitherto enacted in the Soviet Union on criminal law and procedure and, if implemented, could have provided the basis for some kind of civilized legal practice.[1] Some of the studies in this issue will serve to illustrate just how little these principles have actually been observed in some cases.

It is perhaps difficult for dictators to get accustomed to the idea that the main purpose of the law is, in fact, to make their task more difficult. The CPSU, in particular, has a long tradition of treating law as something to be disregarded whenever necessary—which is the practical manifestation of the party's theoretical position on the subordination of law to party policy, discussed by Professor Kamenka

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[1] For a summary and discussion of the "Fundamental Principles," see the author's article, "Judicial Practice and Legal Reform," in *Survey* (London) July-September 1959.

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elsewhere in this issue. Khrushchev and his associates seem to have had a genuine enough intention to clean up the Augean stables of Stalinism in the realm of law as well as in other fields. They were, however, faced with a number of strong pressures tempting them to disregard the law and to resort to the old-fashioned practices which we usually associate with the government of the USSR: a tradition of lawlessness; a growing crime rate which the USSR shares with other postwar industrial countries; a growing wave of "speculation," which is often merely a pejorative term for the attempts of the more enterprising to survive in the face of the inefficiency of an over-bureaucratized system; and the pressure of the party *apparatchiki* to be allowed to continue their traditional practices for fear that the whole system would otherwise crash about their ears. Much of the material studied in the accompanying articles is in fact devoted to the retrograde developments which in so many instances have followed upon the promising legislation of Christmas Day, 1958. These developments can be summarized quite briefly.

First of all, the experience of the past six years has shown that once the authorities are determined to do so, there still is nothing to prevent them from flagrantly flouting their own laws. Professor Grzybowski deals later with a case in which a law imposing the death penalty for certain economic crimes was retroactively applied to a crime committed before the passage of the law. What is so shocking about this case, in this author's view, is not only that it was in direct violation to the Fundamental Principles of 1958, but that judges, procurators, the bar and the party all cooperated to perpetrate this barbarity without—so far as one knows—a word of protest from anyone.

In the absence of full reporting of court cases in the Soviet Union, it is impossible to say how frequent cases of this nature have been, but it would appear from the publicity occasionally given to one of them, or at any rate tolerated by the party authorities, that there are still many Soviet judges and procurators who treat the law and legal machinery as adjuncts of administrative policy. The weekly economic organ of the Central Committee carried an article some months ago criticizing a case in which a young woman, guilty—according to the express terms of the indictment itself—of nothing more than carelessness, had been sentenced to ten years' imprisonment for theft. The judge who had sentenced her, when approached by the reporter who wrote the article, expressed innocent surprise that the woman was still in jail. He had "naturally" sentenced her for theft, he explained, because there had been a local campaign against embezzlement in progress, "but the Supreme Court ought to have put us right." [2]

Another major retrograde step from the 1958 position has been the extensive development of what Professor Leon Lipson (see his article in this issue) has happily called the "Non-Courts and Impolice"—referring to the semi-administrative tribunals and procedures by means of which the Soviet authorities are attempting to deal with those whose anti-social behavior the system condemns, such as the idlers, the parasites, the work-shy, and so forth. One can recognize the magnitude of the problem facing the authorities in this area without sympathizing with the means they are employing to deal with it. It is obvious to any lawyer that procedures of this kind (with which Mr. Albert Boiter is also concerned in his article) are open to the gravest abuses. Where there are no strict legal safeguards and procedure is what is euphemistically called "informal," the subjective element and the private vendetta become apparent before long. The account of the Brodsky case, recently published in the *New Leader* thanks to the courage of the Soviet journalist who made it available outside the USSR, is an example of what can go on in these "non-courts." It is only fair to observe that many Soviet lawyers share in the disapproval of these procedures, and they have apparently been able to exercise sufficient pressure to get a majority of anti-parasite cases transferred to the regular People's Courts from the folk-meetings provided for by the statutes as an alternative procedure. (Hopefully, some of the regular court judges have a little more sense of proper judicial behavior, or a little more civic courage, than the lady who tried Brodsky.) The Soviet press has also on occasion singled out for criticism—and, one hopes, for restitution—particularly scandalous cases of abuse of the anti-parasite procedure for motives of private vendetta.

A third retrograde step has been the extension of the death penalty during 1961-62 to a wide range of crimes for which no civilized

[2] *Ekonomicheskaia gazeta*, (Moscow), August 15, 1964, p. 38.

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penal system today applies this penalty. All in all, in the course of eleven months, capital punishment was extended to almost as many offenses, including bribery and illegal currency transactions (a full list is found in Professor Grzybowski's article). It is idle to justify this severity in penal policy as connected in some way with the "socialist" policy of the Soviet state—unless it is the intention of the authorities to depopulate the country by shooting the "non-socialists," whose offenses are very often dictated simply by their strong desire to escape the meshes of bureaucratic control which the state wishes to impose upon every one of its citizens. The treatment of economic crimes in the Soviet Union has recently been the object of a study by the International Commission of Jurists. This study concludes that the "concentration of law and propaganda on the suppression of economic crimes evidenced a serious modern malaise in Soviet society," and that "private enterprise, honest and dishonest, but in both cases illegal, has been carried on in the very heart of public enterprises." The report also concludes, in view of the disproportionate number of Jews sentenced to death for economic crimes, that anti-semitism "is possibly being used by the Soviet authorities as a weapon to render unpopular economic offenses." [3]

Finally, among the retrograde developments of the past few years must be mentioned the Committees of Party and State Control, set up at the end of 1964.[4] This vast machine extends throughout the country and has unlimited disciplinary powers—ranging from reprimand to dismissal and not subject to appeal—over state employees (a wide category in the USSR) considered guilty of dishonesty or lesser malpractices. The control committees can also initiate criminal prosecutions and/or party disciplinary procedures. Except in cases where criminal prosecution results, there is no supervision by the courts, or indeed by anybody else, to ensure that the procedure is not being abused for improper ends. The existence, as an adjunct to the control committees proper, of a vast nationwide network of "committees for cooperation" drawn from members of the public and under strict party control makes the possibility of such abuse for private or political motives only too likely.

Quite apart from these retrogressions from the promising beginnings of 1958, there are inherent in the Soviet legal and constitutional systems certain built-in defects which particularly lend themselves to abuses for administrative purposes. There is a delusion among some Western writers that the Soviet legal and constitutional systems are "all right" on paper, but are merely not observed in practice. The trouble is, however, that they are far from "all right" on paper, and there are many ways in which the new Soviet leaders—if such should be their intention—could institutionally improve the constitution, which is now in process of revision. For one thing, the "human rights" provisions will remain worthless so long as there exists no method by which the Soviet citizen can call upon the courts to enforce them. This requires, first, some form of judicial review, some method by which laws and administrative acts which contravene the constitution can be set aside by the courts; and secondly, some method by which the courts can be invoked to constrain officials who evade the constitution.

It goes without saying that such a development in the USSR remains improbable unless and until the Soviet party and state authorities recognize the need for an independent judiciary —and this means judges who not only are independent of actual party pressure at all levels, but who (unlike some of those referred to above) are sufficiently convinced of their independence to go against what they believe to be the "climate of opinion," even where no actual pressure has been brought to bear on them. There would also have to be some kind of constitutional court—the new Yugoslav Constitution, incidentally, contains a provision for such a court and, by this fact alone, is well in advance of the constitutions of the other "socialist" states. Under the Soviet Constitution as it now stands, as Mr. Ginsburgs rightly points out in his article, the state alone remains the sole source of all rights enjoyed by the individual; and what the state can bestow it can also take away. It is impossible for these rights to be secure unless and until the state is prepared, in the interests of legal order, to create some more solid basis for that security.

The weakness of the constitutional position is not the only obstacle to the development of the rule of law, though it is probably the most important one. I should be inclined to list three more: First and foremost, there is the

[3] *Journal of the International Commission of Jurists*, Vol. 5, No. 1 (Summer 1964), pp. 3-47.

[4] See *Spravochnik partiinovo rabotnika*, Vol. 5, 1964, pp. 303-09, for the text of the Decree of December 20, 1962. For a detailed discussion of the new control machinery, see Howard A. Swearer, "Who Controls Whom?" *Problems of Communism*, No. 4, 1963, p. 46.

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present inquisitorial system of preliminary investigation of crimes—not peculiar, be it said, only to the Soviet legal system—under which, when once the indictment is framed at the conclusion of an investigation, the court inevitably tends to become little more than a rubber stamp. Secondly, there is the absence of a judicial tradition in the Soviet Union. What of such a tradition had been built up before 1917, in the very restricted area of action permitted to it, was virtually destroyed by Lenin and the Bolsheviks as one of their first actions, and very little of it remains. The ethics of judicial behavior, the presumption of innocence, the rule of natural law against the retrospective application of legislation—all these and like aspects of Western judicial tradition seem to be alien to judges and lawyers in Soviet conditions. These habits come of long practice and cannot be induced either by pious exhortations or by decrees. And finally, there is the low status of the Soviet advocate, to which Mr. Bilinsky draws attention in his article. Whatever the popular attitude towards the lawyer, in the eyes of the authorities he is still an object of suspicion and contempt rather than respect. Yet without a courageous and independent bar of established social status, no real development of the rule of law is conceivable in any society.

. . . the Punishment Fit the Crime?

Everybody who commits a crime for a second time must be classified as a dangerous recidivist and tried accordingly. If a criminal commits a third or fourth law violation, even an insignificant one, he must be punished in full measure: he knew what to expect.

There are many cases in court practice when the same law violator is tried three or four times under the decree on petty hooliganism. This is also wrong. Hooliganism can be considered petty only the first time; after that it becomes a grave crime. Such a man must be tried according to the article on malicious hooliganism, even if the violation is insignificant.

—From "Humanism Is Not All-Forgiveness," by A. Sokolov, Izvestia, Sept. 2, 1964.

The picture, however, is not all black. The worst that can happen to the rule of law in a totalitarian state is what happened under Stalin: the constant and systematic practice of the most flagrant illegality, accompanied by a carefully-drilled, obedient and sycophantic chorus of public men, including practicing and academic lawyers, boasting that the most perfect legality in the world was to be found in the Soviet Union. This is very far from being the situation today. There is still a good deal of illegality, to be sure, but it is nothing to compare with what went on under Stalin. There is also a good deal of criticism, and this gives rise to some hope of further improvement in the future.

It is true that diatribes against illegality started already in Lenin's day, though it was Lenin himself who created (and, so far as one knows, never disapproved) the position above the law that was assumed by his party. The occasional blasts in the party journals today in favor of "socialist legality" should not therefore be treated too seriously, or be expected to have much effect on practice whenever the party finds that violating the law is a convenient expedient for imposing its policy. But the criticism of the last few years has not been confined to conventional party exhortations. On the contrary, it has been such as to indicate that a strenuous debate is going on under the surface of Soviet society in the field of law as in other fields. The issues ventilated in newspaper articles, especially in *Izvestia*, recur with a regularity which suggests that certain topics are being constantly pressed by advocates of the rule of law whenever the opportunity arises. The criticisms of individual miscarriages of justice have been sharp, derisory, and above all quite unsparing of important individuals, even persons in high party office. Some of the most hallowed traditions of Soviet lawlessness have been attacked. It may be that not all these efforts have been in vain. A hopeful sign, for instance, was a recent article by the Chairman of the Supreme Court of the USSR, which in a number of important respects departs from the familiar official sermon on "socialist legality."[5]

This article contains several points of interest. Much of it is devoted to support of the proposition that the preliminary investigation of a crime should not be treated as the trial,

[5] A. Gorkin, "O sotsialisticheskom pravo sudii," *Izvestia*, December 2, 1964, p. 3.

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with the subsequent court proceedings merely serving to endorse a foregone conclusion. "None of the conclusions of the preliminary investigation," writes Chairman Gorkin, "are binding on the court," which must carefully and publicly investigate the evidence on its own responsibility. The significance of this is that it endorses a proposition which has been argued for years by an eminent Soviet academic jurist, Professor M. M. Strogovich. Strogovich has advocated a number of basic improvements in Soviet legal practice but has hitherto met invariably with official criticism and even abuse —he has been accused both of subservience to bourgeois law and of subservience in the past to Stalin and Vyshinsky. In his recent article, however, Gorkin singles out Strogovich's view on the subject of preliminary investigation for praise and dismisses the views of those who have attacked him. One can only hope that this marks the beginning of a new attitude on the part of the Soviet establishment towards some of the more conscientious and courageous academic lawyers.

One other point of unusual interest in Gorkin's article deserves mention. This is his attack on the hallowed Soviet practice whereby, the moment someone is accused of a crime, the press assumes his guilt and begins demanding an exemplary penalty. This practice, says Gorkin, can often have the effect of encouraging miscarriages of justice that might otherwise be prevented. Coming as it does from the highest judicial authority in the USSR, Gorkin's article could conceivably have a salutary influence in instilling in Soviet judges a greater sense of civic courage.

Although Strogovich is the only really liberal academic lawyer to have received such an unusual accolade of official approval, there are several others who have been able to make their views heard—and the extent to which such liberal views win official endorsement in the future will be a measure of the extent to which the new Soviet leaders intend to encourage the development of better legal habits. Two professors in particular come to mind—O. S. Ioffe and M.D. Shargorodski. In the course of 1963, these two scholars seem to have aroused official displeasure by the zeal with which they urged the need for regular observance of legal norms in Soviet society. In a joint article published in April 1963, they based their argument on the proposition that, with the replacement of the dictatorship of the proletariat by the state of the whole people, there is no longer any class left to repress; and that the people can achieve the maximum development of their potentialities only on the basis of fixed and regular norms of law observed throughout the society "from top to bottom." With complete disregard for the subtler interpretations of "socialist legality" which have at times been pressed into service by the party to justify all manner of illegalities, the authors blandly asserted that legality means simply observing the law—always and everywhere.[6]

Although the two scholars escaped censure or attack for this particular article, they did get into trouble as a result of their interventions at a lawyers' congress which took place shortly afterwards (May 1963) in Leningrad. So far as is known, no report of this congress —which was organized by the law faculty of Leningrad University to discuss problems of criminal law—was published, but the nature of the interventions by Professors Ioffe and Shargorodski can be gleaned from the severe attacks made on them in the leading legal periodicals some six months later.[7] The burden of their argument seems to have been that if the observance of legal norms was to become a reality in the USSR, professional academic lawyers must be allowed to offer full and free criticism of legal enactments by the government. Professor Shargorodski was quoted in one of the articles as having said that legal science could only claim to be a science if it had the right to say "no" to practice. One of the objects of his criticism was a decree of the RSFSR of May 6, 1963, increasing the penalty for feeding bread to cattle.[8] A glance at the decree is sufficient to show what prompted Professor Shargorodski's objection. It provides for a fine imposed administratively by the local soviet for a first offense, and only a second offense is made subject to court trial, with conviction entailing a penalty of up to three years imprisonment in addition to confiscation of the offender's cattle. Clearly, therefore, conviction of a second offense, even if decided after proper judicial trial, could well be based on the previous administrative penalization, against which no judicial safeguards are provided and which is therefore open to all manner of procedural abuses.

The two professors were also criticized for urging the desirability of adopting certain principles of bourgeois criminal law and procedure.

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[6] *Sovetskoe gosudarstvo i pravo*, Moscow, No. 5, 1963, p. 49.

[7] In *Sotsialisticheskaia zakonnost*, Moscow, No. 11, November 1963, and *Sovetskoe gosudarstvo i pravo*, No. 1, January 1964.

[8] *Vedomosti Verkhovnovo Soveta RSFSR*, No. 18 (240), May 9, 1963.

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Reading between the lines, it is plain that what they had argued was that observance of legal norms must prevail over expediency in government legislation and administration. This is presumably what their official critics meant when they wrote that some legal scholars had "incorrectly understood the role of legal science in the solution of the practical tasks of government." But the real trouble seems to have been that these scholars understood it only too well —and were courageous enough to speak their minds.

It must be obvious to any informed student of Soviet society that the prospects for the rule of law in the USSR are not to be overestimated. True, the most recent signs have not been too discouraging: Gorkin's article is a case in point, and the reported releases of both Brodsky and Madame Ivinskaia, if true, would appear to suggest that the new rulers are at least more sensitive than their predecessors to outside civilized opinion regarding such miscarriages of Soviet justice. But one swallow does not make a summer. There is a long tradition of lawlessness and arbitrariness to overcome; a respected and independent judiciary and bar remain to be built up; and the party will have to learn to recognize that when academic lawyers criticize some of the more flagrantly illegal Soviet practices, they do so as loyal Soviet patriots with the best interest of their country at heart. Above all, the party will have to learn to live and act within the law, rather than above it as at present.

This said, there are nonetheless some grounds for moderate optimism. One is that the voice of civilized criticism is now being heard, as indeed it has been continuously since 1953. This is a big change. In Soviet conditions, the fact that criticism is allowed to appear at all leads to the reasonable inference that there are persons in authority who sympathize with the critics—here again, perhaps the Gorkin article may be a case in point. Professors Shargorodski and Ioffe, it is true, have not been allowed to publish since 1963, but one presumes that nothing worse has happened to them (Who would have dared to presume this twelve years ago?), and one can reasonably hope that their works will again appear in the learned journals before long. Slowly, even if very slowly, the responsible Soviet public is learning from these persistent exponents of the rule of law just how the things that are wrong in Soviet legal practice could be put right. This is perhaps the first necessary step towards improvement.

However, the main obstacle to the development of the rule of law is, as it always has been, the vested interest of the party apparatus in arbitrary illegality. This has to some extent been dictated by Soviet conditions of administration. The administrative machine is overcomplex, over-centralized, over-bureaucratized, and totally unfit for its task. Only the party can cut through the jungle of administrative red tape, and it has always done so by ignoring the law. Add to this the heritage of several generations of contempt on the part of the party apparatus for the whole state machine, and the results are not difficult to imagine.

Yet it could be that the climate of opinion in the Soviet Union is moving away from this traditional pattern. Technical progress, efficiency of production, and a society geared to a numerous variety of consumer interests demand regularity, and regularity demands legal norms. In Soviet conditions, only the state machine can supply these legal norms. At present the state machine is more powerful vis-à-vis the party machine than it has been for years, and it may continue in this position so long as the offices of prime minister and party first secretary remain separate. It may, of course, soon lose its advantage to the party should one of the party secretaries, like Stalin and Khrushchev before him, be able to combine both offices in his person. On the other hand, this may not occur, and if not, there is a chance that the influence of the party will decline as the influence of the state machine increases.

Should this happen, the outlook for the rule of law would be correspondingly improved. Constitutional changes might follow, and there might be some institutionalization of legal safeguards in place of the present meaningless declaratory platitudes. Modest as this optimism may seem, it is at all events the first time in Soviet history that it has even become possible to contemplate these possibilities.

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The Soviet View of Law

By Eugene Kamenka

***"Law," said Lenin, "is a political measure. Law is politics." No one can examine the foundations of legal doctrine in Russia without the sense of the completeness with which this conception has permeated the whole fabric of the law. Behind all of it is the relentless purpose of consolidating the dictatorship of the proletariat. In every phase of the law, property, contract, tort, crime, this note is the threefold one of crushing counterrevolutionary resistance, of freeing the workers from the impact of what are regarded as capitalist habits, and of building up a social outlook able to work the principles of the Communist society.*—Harold J. Laski, *Law and Justice in Soviet Russia*.[1]**

Karl Marx had a profoundly negative attitude towards law. He dismissed sharply all talk of "legality," abstract "justice," and abstract "right" as having any theoretical value: for him, such terms were, at most, sops to be resorted to occasionally in dealing with the woolly-minded liberals who made up much of the First International. Law to Marx was an instrument of oppression and class rule, a system of sanctions designed to safeguard the fundamental principles of class rule and the particular interests of the ruling class. At a deeper level, he regarded law as resting on the abstraction of the individual from his social background and his social life: just as the capitalist market converted men's products, men's work, and thus men themselves into commodities, so law enslaved man to something outside himself, made him the object instead of the subject of social life. Law, in his view, arises and maintains itself in a society rent by antagonistic classes, where men live at one another's expense. When private property has been abolished and the social organization of production has taken its place, when the true social interest has established itself and man has become the subject and not the object of history, the need for coercion disappears, and law and the state wither away and die. "Rights and duties,' Marx wrote in the *German Ideology*, "are the two complementary sides of a contradiction which belongs only to civil society." Seven years later, in an article for the *New York Tribune*, he wrote: "Punishment, at bottom, is nothing but society's defense

Mr. Kamenka, a Fellow in the History of Ideas at the Australian National University, has contributed to political and philosophical journals and is the author of The Ethical Foundations of Marxism *(London, Routledge and Kegan Paul; New York, F. A. Praeger, 1962).*

[1] Day to Day Pamphlets, No. 23 (London, 1935), p. 39.

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of itself against all violation of its conditions of existence. How unhappy is a society that has no other means of defending itself than the executioner!"

The history and social conditions of prerevolutionary Russia did much to lend plausibility to Marx's onslaught on law. The "emergency conditions" under which the eastern Slavs spent so much of their history—the battering they received at the hands of Mongols, Swedes, and Livonian Knights; the emergence of the centralized Muscovite state; the crushing of the Boyars; the institutions of state lands and state peasants, of a service nobility and of serfdom—all helped to create and consolidate a situation in which government was held to be necessarily autocratic and law readily became a series of decrees. Before the judicial reforms introduced by Alexander II in 1864, writes Michael Florinsky, the judicial system was characterized by "inhuman severity of punishment, multiplicity of judicial agencies, complexity of procedure . . . secrecy and arbitrariness and heartless formalisms." [2] To most of the Russian intelligentsia, as much as to the peasant, law meant the knout. It was a means of suppression—of intellectuals by the state, of peasants by their masters, of wives by their husbands. Even where the law guaranteed formal rights, these had no value in the material context of an autocratic society. As the Russian revolutionary, N. G. Chernyshevski observed at the time that Marx was writing *Das Kapital:*

Man is not an abstract legal person, but a living creature . . . a man who is dependent for his material means of existence cannot be an independent human being in fact, even though his independence is proclaimed by the letter of the law.[3]

True, in the period from the 18th century up to the Russian Revolution, there were men like S. F. Desnitski (c. 1740-89, translator of Blackstone's *Commentaries* into Russian), A. D. Gradovski (1841-89), and M. M. Kovalevski (1851-1916), who played a prominent part in liberal constitutional discussion. But such men tended to belong to the liberal wing of the academics (public servants), and not to the true, largely revolutionary intelligentsia; their influence on events and on the revolutionary movement proved negligible. By 1909, writing in the collection *Vekhi* (*Landmarks*) V. Kistiakovski felt that he had to defend the rule of law and the concept of legality against Russian intellectuals of all political shades, from Leontiev and the Slavophiles to Herzen and both Marxist and non-Marxist radicals.[4]

The Soviet state, Communist jurists have stressed, "emerged not on the basis of some written statutes, but as a result of the direct initiative of the masses, which in the course of the Revolution destroyed the old order, the old legality, the old system of authorities, and created in their stead their own system of power, their own governmental agencies." [5] The profession of advocate (private attorney), the old courts of justice, and the old Procuracy (Department of Public Prosecutions) were abolished by the Decree on Courts No. 1, December 7, 1917; and the new People's Courts were instructed to apply "the laws of the overthrown governments only insofar as they were not abrogated by the Revolution and did not contradict revolutionary conscience and the revolutionary concept of law."

The first decrees of the new Soviet government were not regarded by their promulgators as laws in the traditional sense. "Not the *corpus juris Romani* but our revolutionary consciousness of justice ought to be applied to 'civil law relations'," Lenin wrote to People's Commissar of Justice Kurski in 1922.[6] Five years earlier, in 1917, he had written:

It does not matter that many points in our decrees will never be carried out; their task is to teach the masses how to take practical steps . . . We shall not look at them as absolute rules to be carried out under all circumstances.[7]

In other words—the words Trotsky was to use later in his autobiography—the decrees were "the program of the party uttered in the language of power . . . a means of propaganda rather than of administration." [8]

The courts were to be guided by "conscience" rather than by law. Thus, the rules of the Pro-

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[2] Quoted from Michael Florinsky, *Russia: A History and an Interpretation* (2nd ed., 1955), in Albert C. Malone, Jr., "The Soviet Bar," *Cornell Law Quarterly*, Vol. 46 (1960-61), p. 260.

[3] In *Polnoe sobranie sochinenii* (*Complete Collected Works*), ed. by V. Ia. Kirpotina, Moscow, 1939-53, Vol. IV, p. 740.

[4] See George L. Kline, "Socialist Legality and Communist Ethics," *Natural Law Forum*, Vol. 8 (1963), p. 21.

[5] *Sorok let sovetskovo prava 1917-1957*, Moscow, 1957, Vol. I, p. 16.

[6] Quoted in Rudolf Schlesinger, *Soviet Legal Theory*, London, 1945, p. 150.

[7] Quoted in Kazimierz Grzybowski, *Soviet Legal Institutions*, Ann Arbor, Univ. of Michigan Press, 1962, p. 42.

[8] Quoted from L. Trotsky, *Moia zhizn* (1930) in *ibid.*, p. 42.

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visional Revolutionary Court of the Government of Novgorod—which were typical of many such rules—provided:

[*Sec. 15*] *The court decides on the issues by conscience, on the basis of its own conviction.* [*Sec. 18*] *In imposing punishment upon the guilty person, the court is not bound by any existing laws, but is authorized to use the existing criminal laws for non-obligatory reference.*[9]

Or, as Kurski was to put it later:

The bourgeois judge could only supplement the statute by interpretation. The scope of the proletarian People's Court is much wider. In its basic function—criminal prosecution—the people's court is absolutely free and is guided above all by its consciousness *of law.*[10] [*Stress added*]

Writing in 1927, P. J. Stuchka, then Chairman of the Soviet Supreme Court, affirmed that "communism means not the victory of socialist laws, but the victory of socialism over any law, since with the abolition of classes with their economic interests, law will disappear altogether." [11] This certainly seems to have been the attitude with which the Bolsheviks entered upon their reign. The various decrees promulgated between 1917 and 1921, it is true, showed a certain amount of vacillation on the relationship of the revolutionary tribunals and people's courts to prerevolutionary legal relationships and legal concepts that had not been specifically abrogated by the new regime, but the main tendency was to elevate consciousness, loyalty to the Revolution, and Bolshevik discipline above any concept of law as such. Revolutionary law was seen as a system of decrees designed to suppress class enemies and to facilitate the construction and initial functioning of socialist institutions. It would wither away once the whole country had become truly Bolshevik.

With the New Economic Policy (NEP) of 1921-28, however, there was in certain respects a basic reversal of the trend towards governing by revolutionary justice. The Soviet authorities now permitted—indeed facilitated—the reappearance of money, private trade, kulaks, and private business managers operating under state license. A detailed system of law and legal procedures designed to fit these conditions quickly emerged. In 1922 and 1923, the Soviet authorities promulgated a Judiciary Act, a Civil Code, a Code of Civil Procedure, a Criminal Code, a Code of Criminal Procedure, a Land Code, and a new Labor Code.

The NEP, however, was only a temporary, partial, and strictly controlled restoration of the capitalist market. The laws required were therefore seen not as lasting socialist laws but as temporary legal arrangements on the capitalist model which would disappear when the concessions to capitalism were once more eliminated. The drafters of the new codes frankly based them on the codes of the non-socialist world—of Germany, Switzerland, Imperial Russia and France. Legal capacity, persons, corporations, legal transactions, statute of limitations, property, mortgages, landlord-and-tenant relations, contracts and torts, unjust enrichment and inheritance, were all dealt with in traditional terms, although subordinated in the last resort to the supposed economic interests of the proletariat. Article 1 of the Civil Code stated: "Civil rights shall be protected by law except in instances where they are exercised in contradiction with their social-economic purpose."

At the same time, legal representation and legal education were again formalized. Following the abolition of the old professional bar in 1917, the Decree on Courts No. 2 of March 1918 had provided for the formation of special colleges of persons—not necessarily legally trained—devoting themselves to legal representation, while also maintaining the right of any citizen present in court to act as an accuser or defender. These colleges had likewise been abolished in 1920, after which the courts had been empowered to draw up special lists of "defenders" consisting mainly of officials in public enterprises and unions who were not normally lawyers. Now, in 1922, a bar of professional attorneys-at-law (*advokatura*) was set up; university law training or two years of actual legal work was made mandatory for admission to practice; and attorneys' fees were fixed on the basis of a percentage of the client's income.[12]

Meanwhile, genuine—though politically circumscribed—juristic discussion and legal research accompanied the drafting of the new codes. If many of these documents nevertheless showed signs of having been drawn with haste, Soviet lawyers still could point with pride to

[9] Quoted in *ibid.*, p. 43.
[10] Quoted in *ibid.*, p. 47.
[11] Quoted in Vladimir Gsovski, *Soviet Civil Law*, Ann Arbor, University of Michigan Law School, 1948, p. 170.

[12] For a recent summary of the development of the Soviet bar, see Ivo Lapenna, "The Bar in the Soviet Union and Yugoslavia," *International and Comparative Law Quarterly*, Vol. 12 (1963), pp. 632-35.

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the modernity of some of their theoretical views on crime and criminology. Thus, Soviet courts applied such humane methods of correction as the suspended sentence, public censure in place of fines, and constructive labor in place of confinement. The purpose of penal measures, it was proclaimed, was the defense of society and the reformation and reeducation of offenders, not retribution.

Nevertheless, all this juristic work was seen as purely transitional—*i.e.*, as consisting of measures directed against a necessarily dwindling group of class enemies and socially irresponsible elements or of regulations made necessary by the continuing but only temporary existence of property. In the view of such Soviet legal theorists as Reisner and Pashukanis, Stuchka and Krylenko, there still was no such thing as socialist law. Law, they argued (following Marx at his subtlest level), was a reflection of the laws and assumptions involved in the exchange of commodities and the organization of production on the basis of private property. The essence of law, wrote Pashukanis, is the contract of commercial exchange: man as a juridical person is a right-and-duty-bearing unit involved in "exchanges" with other right-and-duty-bearing units. This is so not only in civil law, but also in domestic law, where marriage and adoption are seen as contractual relationships; in public law, where the state is seen as standing in a "social contract" with its citizens; and in criminal law, where the idea of retribution has given way to the notion of the contract *ex post facto*—of the punishment as "payment" for the crime. Law thus develops fully only in bourgeois society, Pashukanis argued, because only there do the laws and assumptions of commerce fully develop; with the birth of communism, with production for use and the supersession of private property and commercial exchange, law necessarily dies.[13]

After the abandonment of the NEP and the launching of the first of the Five-Year Plans in 1928, those espousing this view saw the withering away of bourgeois law and its replacement by the socialist plan as close at hand. The teaching of civil law was abandoned at Moscow University, where Pashukanis was dean. Speaking in 1930 on "The Soviet State and the Revolution in Law," Pashukanis said:

In bourgeois-capitalist society, the legal superstructure should have maximum immobility—maximum stability—because it represents a firm framework of the movement of the economic forces whose bearers are capitalist entrepreneurs. . . . Among us it is different. We require that our legislation possess maximum elasticity. . . . law occupies among us . . . a subordinate position with reference to politics. We have a system of proletarian politics, but we have no need for any sort of juridical system of proletarian law.[14]

Pashukanis' work is, without question, the most interesting produced by Soviet jurisprudence precisely because it is the most closely linked with the more subtle aspects of Marx's critique of commercial civilization—that is to say, because it pursues, in essence, the since popular theme of alienation and puts very little weight on the cruder Marxist line about class interest and class domination. But theoretically capable as Pashukanis undoubtedly was, the practical effect of his work was to strengthen the Bolshevik line that the party was above the law, that the party, indeed, *was* Law. It helped to produce the atmosphere in which new Soviet administrators were trained to calculate the effects of their actions on the party and their political position, and not the relationship of these actions to law. It made possible the ideological justification of arbitrary arrest, administrative punishment, secret trials, etc. By placing "socialist construction" above and against the law, it made it possible for Andrei Vyshinski, then Deputy Procurator-General, to say in his report to the General Assembly of the College of Defenders on December 2, 1933:

The defense in the Soviet court must be based on profound principle. The principles of the Soviet defense must be those of socialist construction . . . [the advocate must present] all his proofs in defense of the accused without descending from the terrain of principle held in common with the court, with the prosecution, with the whole country—from the terrain, that is, of the interests of socialist construction, the interests of the state of the proletarian dictatorship.[15]

Further, Pashukanis' ideas created an atmosphere in which professional lawyers were looked upon with suspicion except where they were acting as investigators or prosecutors for the

[13] E. Pashukanis, *Obshchaia teoria prava i marksizm* (General Theory of Law and Marxism), 2nd ed., 1926.

[14] Quoted in Harold J. Berman, *Justice in Russia*, Cambridge, Mass., Harvard Univ. Press, 1950, p. 33.

[15] Cited by Lapenna in *op. cit.*, p. 645.

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state. The drive for collectivization in 1929 was extended, by pressure instead of legislation, to the professional bar, which was transformed from an organization or union of private practitioners into a collective. The high proportion of attorneys with prerevolutionary legal training made them especially vulnerable to political purges: in Moscow alone, according to a Soviet émigré who was present at the time, 200 members of the bar were arrested in 1931, another 400 in 1935, and 165 in a single night in 1938.[16] Almost all of these were sentenced administratively, without trial, and never heard of again.

Meanwhile, however, certain tensions were building up between the Soviet desire for complete and untrammeled powers of political direction and the newborn desire for a certain stability and regularity in the day-to-day affairs of Soviet life. According to the recollections of Professor Boris A. Konstantinovski, there was a steady stream of cases passing through the Soviet courts—commercial disputes between enterprises or between enterprises and their employees, thefts and misappropriations, abuses of official authority, and cases of official negligence. These were often handled by the judges much as they might have been by a Western magistrate—and on occasion the accused might, with luck, even score a minor triumph over a low-ranking party official.[17]

That Soviet judges were under pressure to show their zeal in convicting, especially in cases of misconduct regarded as setting a socially dangerous example, there can be little doubt. But there was a growing emphasis, at least in minor matters, on formal legality. Then, in 1936, this suddenly became a major political slogan. The period of social reconstruction, Stalin announced, had ended: the Soviet Union was entering the era of socialism with a new (Stalin) constitution and a new concept—socialist legality. Law was not to begin withering away; on the contrary, as Soviet jurists were told at their general convention in Moscow in 1938, "under socialism . . . law is raised to the highest level of development." Pashukanis and Stuchka were now denounced as counter-revolutionaries, traitors and wreckers, and accused (by their former colleague, Vyshinski) of sliding into the bog of economic materialism, of liquidating law as a specific social category, drowning it in economics, and depriving it of its active, creative role. Must those laws which govern marriage and family relationships also be regulated from the viewpoint of "socialist planning"? Vyshinski asked rhetorically. He went on to quote Article 112 of the Stalin Constitution, stipulating that "judges are independent and subject only to law," as proof that law had its own specific role under socialism and was not merely subservient to politics and economic planning.[18]

For the philosopher of law, the theory of "true socialist law"—"perhaps bourgeois in form, but socialist in content"—developed during the post-1936 period of Stalin's dictatorship is totally uninteresting. Vyshinski's chief theoretical work,[19] published in 1948, shows a conspicuous decline from the intellectual standards established by Reisner, Stuchka and Pashukanis in their theoretical writings. In that work and other subsequent writings, Vyshinski adheres inflexibly to the class view of law, formulated in crude, conspiratorial terms. Law, he asserts, represents the interests of the dominant class and those common rules of community life which are advantageous to the ruling class. Socialist law, however, differs from bourgeois law in that in socialist society the ruling class itself represents "the true interest" of the people, of all Soviet citizens. The onslaught on "capitalist law" throughout this period—and even subsequently—degenerated into the coarsest kind of falsification, exemplified by Vyshinski's treatment of the Dreyfus case, the prerevolutionary trial of Beilis on a trumped-up charge of ritual murder, and the Sacco-Vanzetti scandal as "typical" examples of bourgeois justice.[20]

"Socialist legality," then, did not mean to Vyshinski and Stalin—any more than it does to their present successors—the creation of a *Rechtsstaat* in which political power is subject, both in principle and in practice, to legal restraints, legal rules, and legal challenge. Throughout the period of "socialist legality"

[16] A. Simionov, *Advokatura S.S.S.R.*, (*The Bar of the USSR*), unpublished manuscript of the Institute for the Study of the USSR, Munich, Germany, 1954, cited in Malone, *loc. cit. supra*, p. 269.

[17] *Soviet Law in Action*, ed. by Harold J. Berman, Cambridge, Mass., Harvard Univ. Press, 1953, *passim*, esp. pp. 4-5.

[18] In "Osnovnye zadachi nauki sovetskovo sotsialisticheskovo prava" (Fundamental Tasks of the Science of Soviet Socialist Law), *Sovetskoe gosudarstvo*, No. 4, 1938.

[19] *Sovetskoe gosudarstvennoe pravo* (1938): English ed., *The Law of the Soviet State*, ed. by A. Y. Vyshinski, transl. Hugh W. Babb, New York, 1948.

[20] Similarly, V. Karpinsky, in his *The Social State and Structure of the USSR* (Moscow, Foreign Languages Publishing House, 1950, p. 132), wrote: "The local judges in capitalist countries are completely under the influence of the various bourgeois parties. Bribery and corruption are so widespread among the judiciary that it is not at all a rare sight to see one of them removed from the bench to the prisoner's dock for trafficking too openly in justice."

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under Stalin, the security police had the power to investigate crimes and to execute or deport persons under special rules, without the intervention of the courts or even of the Procurator-General of the USSR. Military courts and special secret-police tribunals had wide jurisdiction over civilians; and laws enacted in 1934 and 1937 permitted the trial of accused persons *in absentia* and/or without representation by counsel. In connection with the purge trials, Vyshinski elaborated the doctrine that confessions had special value as evidence in cases of serious political crime (on the specious ground that no one would confess to such crimes unless guilty), and that in such cases the burden of proof rested on the accused. Not only did the statute books carry such vague offenses as "committing a socially dangerous act," but they even revived the old Tsarist doctrine of "analogy" (abolished in 1903), under which a man might be convicted and sentenced for an act not specifically covered by existing criminal laws but "analogous" in some respects to an act that was. Above all, behind these formally questionable provisions lay the stark reality of one of the most brutal and pervasive police terrors ever known.

The irony of Stalinist legal doctrine lay in the fact that it was an attempt to do precisely what the cruder sort of Marxist writing accused capitalist law of doing. Having once been dismissed as a bourgeois institution, law was converted by Stalin into an instrument of party dictatorship. Its function was to create a certain amount of regularity and predictability in routine social affairs and, *above all,* to invest the decrees of the Soviet state with that magic aura of impartiality and impersonality which the law provides simply by being "the law." When Stalin spoke, as he did increasingly, of the creative role of Soviet law, he had in mind precisely the capacity of legal forms to instill awe and respect in the Soviet population and to gloss over the arbitrariness and sectional nature of political power in the USSR.

The death of Stalin, the rise of "collective leadership," Khrushchev's secret speech and the destalinization campaign, the various "thaws," and the fall of Khrushchev himself have not resulted in any fundamental revolution in the Soviet "philosophy of law" comparable to that initiated by Yudin and Vyshinski (presumably under Stalin's orders) in 1936. "Socialist legality," after all, was originally a Stalinist slogan. Like Stalin, his successors have continued to claim that law and the state will "wither away" under true communism, while the family—originally expected to wither away as well—will remain and blossom forth in its true glory. Stalin, in line with his coercive interests and inclinations, argued by Hegelian dialectic that before the state and law could wither away, they must reach their greatest peak of development—that is, they could die only by first becoming stronger. Since his death, the CPSU has proclaimed—if not very convincingly—that the era of communism is now being approached, and that the withering-away of the state and law may thus be expected to begin.

In the process of explaining this, however, the party leaders have subtly changed the content of the original expectations. What is now to wither away is not coercive power itself, but merely the formal state and judicial organs of coercive power, which will first be supplemented and then gradually supplanted by citizen's assemblies acting as tribunals and volunteer brigades and committees acting as popular vigilantes. Even while these new instruments of arbitrary power are coming into being, the Soviet regime proclaims that it is continuing to strengthen "socialist legality." Such are the contradictions allowed by the dialectic!

The contradictions, however, are no longer primarily of the regime's making. The outstanding feature of the post-Stalin period is neither a radical break with the formal principles of Stalin's brand of Marxism nor a wholesale institutional change; it is rather a relaxation of terror and the consequent opening to view of some of the pluralistic tensions and contradictions that have been building up in Soviet society over the past few decades. As the writer has argued elsewhere,[21] these are primarily connected with the inevitable tensions between growing professionalization and the demands of an advanced industrial society on the one hand, and the party's anxiety to maintain both decisive political control and its claim to ultimately absolute authority in all fields on the other. The party, in seeking to alter the mixture of persuasion and coercion (on which all dictatorships rest), has been balancing on a tightrope, gauging the winds of change it helped to liberate, leaning sometimes with them, often against them.

In these circumstances, the attempts of Soviet jurists to systematize a post-Stalinist Marxist

[21] In my *Thomas Memorial Lecture, 1964—The New Look in the Soviet Union* (University of Melbourne A.L.P. Club, Melbourne, 1965). See also the writer's forthcoming article, "Pluralism and Soviet Culture," to be published in *Communist Divergencies and the World*, ed. by J. D. B. Miller and T. H. Rigby (A.N.U., Canberra, 1965).

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philosophy of law have completely lost their theoretical unity and thrust and have become little more than barometric indications of the relative strengths of competing pressures within Soviet society. Marxism as an ideology with pretensions toward theoretical coherence is patently falling apart, and the tensions within Soviet juristic theory and practice no longer have a characteristically Marxist flavor. Fundamentally, these tensions reflect the impact of basically non-Marxist—one might even say "Western"—demands for legal protection, certainty and independence vis-à-vis possible administrative abuses, even by the Communist Party itself, and the attempt of the party to meet and at the same time counterbalance some of these demands.

"Socialist legality" and the gradual normalization of Soviet society, even under Stalin, produced and strengthened a new class of Soviet lawyers with a growing claim to special expertise in their field. In 1946, the CPSU Central Committee noted that there were insufficient cadres of jurists and that the teaching of law had become sadly neglected. The number of institutions of higher legal education was increased, and courses for lawyers were lengthened. The steady and very significant rise in the number of law students and trained lawyers brought with it a growing, albeit stifled, demand for greater recognition of the value of the lawyer's work.

It was only after Stalin's death, however, that these demands were openly voiced, and to some extent met. The lawyers' journal *Sovetskaia yustitsia* began stressing the need for raising the standards of the bar, pleading at the same time that it be afforded proper respect and cooperation.[22] Khrushchev's secret speech of February 1956, with its admission of malpractices under Stalin, and the review of political sentences that went on between 1953 and 1957, resulting in many "rehabilitations," created a

[22] See, *e.g.*, editorial in issue No. 7 of 1957 and article by Chekhalin ("Safeguarding Conditions for the Proper Activities of the Advocate") in issue No. 2 of 1958. See also article by Solopchinko and Vilenskii in *Sotsialisticheskaia zakonnost*, No. 8 of 1957.

A "Capitalist Survival"? . . .

The era of political, social and spiritual slavery that remained back beyond the border of the October Revolution left us with shameful survivals of the past, including alcoholism, that are tenacious in the consciousness of certain people.

At one time drunkenness was born out of darkness, ignorance, prejudice and church holidays. Its sources were anger, poverty, fear and unemployment. . . .

Not one of these reasons exists today. They have been excluded from our life by the Soviet social system. But even deprived of its roots, a survival can still exist at times and hamper our cause, if a resolute, relentless struggle is not waged against it. V. I. Lenin warned that "the traces of the old in morals will, a certain time after the overthrow, inevitably prevail over the shoots of the new."

To this day, the alcohol habit retains many peoples in its clutches. It turns them into invalids and cripples, brings them to the prisoner's dock, breaks up families that only yesterday were happy, and kills the mind, spirit and emotions. . . .

. . . or a "Pathological State"?

The alcoholic is a man who has lost the focus of his life. He needs the exacting, attentive aid of the collective.

Science has determined that "alcoholism is not a sickness but a harmful, dangerous habit." Yes, alcoholism is, needless to say, a pathological state. But a man falls into it consciously. It is not for nothing that our laws show no mercy to criminals who commit their dark deeds in an unsober state.

From these positions we must say firmly and implacably: Alcoholism is in an antisocial phenomenon, alcoholics are harmful elements, dangerous to society, and the struggle against them must be waged not only by means of persuasion but also through coercion. . . .

Narcological psychiatrists contend that alcoholics who refuse to be treated and who represent a threat to society must be isolated and kept in conditions of a strict regimen in labor-cure colonies for no less than a year. Treatment in conditions of prolonged isolation and compulsory labor will yield positive results. . . .

—From "There Can Be No Conciliation with this Survival!," by Zakhar Dicharov, Pravda, Aug. 4, 1964

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climate in which it became permissible to stress the need for formal respect of human and legal rights and the desirability of safeguards that would make administrative disregard of such rights difficult or impossible. Against this background, Soviet jurists began stressing the advantages of certain Western formalist conceptions—in particular, the concept of a trial as a contest between an equally-favored prosecution and defense in the context of a presumption that anyone accused of a criminal offense was innocent unless proven guilty. There were even suggestions that still stronger safeguards might be obtained by introducing a sort of jury system, although the authors attempted, unsuccessfully, to hide the radical nature of their proposal by framing it in terms of increasing the number of people's assessors from two to six.[23]

The party met some of these demands in the wholesale revision of codes begun after the constitutional amendments of 1957. The Special Board of the Ministry of Internal Affairs, which had the power to send people to labor camps without a hearing, was abolished. The security police were placed under the supervision of the Procuracy. The special procedures for cases involving the most serious counterrevolutionary or anti-state crimes were taken out of the law, and Vyshinski's doctrines shifting the burden of proof to the accused and lending special importance to confessions in cases of counterrevolutionary crime have been repudiated. Military courts have been deprived of their jurisdiction over civilians except in cases of espionage. The law permitting the punishment of relatives of members of the armed forces who desert abroad has been abolished. The Fundamental Principles of Criminal Law, promulgated in 1958, stipulated that no criminal law could be retroactively applied unless the law itself specifically so provided. The status of the defense lawyer is in the process of being redefined more carefully and more favorably, while the active participation of attorneys' organizations as well as of law faculties and institutes has been sought in formulating the preliminary drafts of new legal codes. Great significance is now being attached to the Procurator-General's powers to review the records of court trials and institute proceedings for revision of sentence as a further safeguard against repetition of the criminal violations of socialist legality that occurred in the past.[24]

On the other hand, the drive to strengthen "socialist legality" has been carefully contained. The suggestion for a jury system was rejected as a return to a Tsarist institution, and the presumption of innocence has not been incorporated in the Fundamental Principles of Criminal Law. While federal jurisdiction in the making of codes has been heavily curtailed, the Procuracy has been strongly centralized. A number of procedural guarantees suggested by the legal profession for inclusion in the codes have been stricken out in the draft stage. Capital punishment has been restored for certain economic crimes, and in one case this penalty seems to have been imposed retroactively in spite of the specific prohibition contained in the Fundamental Principles of 1958.[25] The "anti-parasite" laws adopted by several union republics at the end of 1957 and by the RSFSR in 1961 have restored to the statute books a crime as vague as the old "socially dangerous acts." The *druzhiny* (people's militia), established in 1958, were already said to have grown to 2.5 million by 1960; they actively and officiously call Soviet citizens to order for minor infringements, while the *bytovyie otryady* (volunteer patrols) of the Komsomol visit Soviet citizens in their own homes to settle disputes and inculcate collective principles. In 1962, violent resistance to arrest by either police or members of the *druzhiny* was made a capital offense.[26] Meanwhile, the growth of "comrades' courts," empowered to try minor matters informally, has been actively encouraged as part of the movement towards true communism.

All this points to the conclusion that the Soviet view of law has not simply and completely broken with its recent past. As Professor Harold J. Berman, of Harvard University, has written:

If one looks behind the structure to the purposes of Soviet law, it remains a totalitarian law, in the sense that it seeks to regulate all aspects of economic and social life, including the circulation of thought, while leaving the critical questions of political power to be decided by informal, secret procedures beyond the scrutiny or

[23] On the position and function of people's assessors, see the article by Mr. Andreas Bilinsky in this issue.

[24] See speech of Procurator-General R. A. Rudenko introducing the draft Fundamental Principles of Criminal Law to the Supreme Soviet on December 25, 1958, published in the stenographic minutes of the Fifth Convocation (second session) of the Supreme Soviet of the USSR (Moscow, 1959), and the extract translated in John N. Hazard and Isaac Shapiro, *The Soviet Legal System*, New York, Oceana Publications, 1962, pp. 10-11.

[25] For a discussion, see the article by Kazimierz Grzybowski in this issue.

[26] See Kline, *loc. cit.* (footnote 3), pp. 28-9.

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control either of legislative or of judicial bodies. It remains the law of a one-party state. It remains the law of a planned economy. It remains a law whose primary function is to discipline, guide, train and educate Soviet citizens to be dedicated members of a collectivized and mobilized social order.[27]

At best, the "philosophy of law" approved by the Soviet party leadership is akin to that which might guide a Western juvenile court: the duty of the Soviet citizen is to be a good child, to work hard, to obey his elders, and to learn to live and play with others. Against this "philosophy" stand the pressures exerted by Soviet citizens who no longer feel themselves to be entirely dependent children, who want guarantees, rights, and some recognition of their human and professional dignity. Mostly they express their demands in Marxist jargon, but this only robs their point of its effectiveness.

The complexity of the Soviet situation lies in the fact that the tension between "socialist legality" (reflecting the impact of Western concepts) and Bolshevik coercive paternalism has to some extent penetrated to all levels of Soviet society and certainly into the party itself. At the present moment, the Soviet leaders are trying hard to have it both ways, and so are their critics at home who cannot hope to speak unless they at least pay lip service to Bolshevik paternalism. The practical results are indeed considerably better than in Stalin's day, but the accompanying eclectic apologies for a legal philosophy or a Marxist view of the world can hardly be taken seriously as theoretical contributions to the understanding of law and its role in society.

[27] "The Dilemma of Soviet Law Reform," *Harvard Law Review*, Vol. 76 (1963), p. 930.

Simplicity and Popularity: Early Dreams

By John N. Hazard

The Bolsheviks inherited a legal order in November 1917 that had been gradually disintegrating since the fall of the Tsarist regime eight months before. Revolt against authority was widespread. The common man believed himself freed of the duty to obey. Intellectuals knew better, but some of them expected the state and law soon to begin to "wither away." Courts lost dignity and respect. The Bolsheviks themselves, of course, had nothing but contempt for the "bourgeois" legal order, and so it was not surprising that they abolished it formally a few weeks after coming to power.[1]

A system of "people's courts" was inaugurated in late November 1917 to replace the old legal system with a sense of "family-like" resolution of conflict.

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[1] References to decrees, judicial decisions, cases, etc., cited herein may be found in J. N. Hazard, *Settling Disputes in Soviet Society: The Formative Years of Legal Institutions*, New York, Columbia University Press, 1960.

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Workers and peasants were to be given a sense of being among friends. No professional judges, prosecutors or defense attorneys were to participate. The judge was to be a community elder or a trusted Communist and was to be helped by two neighbors chosen for each successive case. The prosecution was to be guided by relatives of the injured party or by socially-minded citizens. The accused, whether a criminal or civil defendant, was to seek his own assistance from relatives or friends. A socially-minded community was expected to organize the simple tribunal necessary to meet its own needs of social order. When cows trampled the crops of a neighbor, the remedy was to be a simple lawsuit decided by the village wise man and his two assistants. Decisions were to be made on the basis of time-honored concepts, tempered by what was called "socialist consciousness," and administered without reference to rules of court procedure.

The first decree indicated that its authors expected the simple people's courts to be replaced shortly by a system of settling disputes without state intervention. Parties were authorized to take civil disputes to *ad hoc* arbitration tribunals. Even those criminal cases were to be brought before the arbitrators which under the Tsarist codes could have been prosecuted only if the injured party sought redress. Under the new system, the state apparatus was expected to withdraw from disputes in which an injured party had no desire for revenge.

Simple as it was, the new system soon ran into difficulties. To resolve disputes that had remained from the period prior to the revolution, a second decree published in February 1918 created "District People's Courts" to be distinguished by greater emphasis on professionalism. It provided for three fulltime judges instead of one, together with a bench of lay judges, to hear the cases. The records of trials were to be subject to review by a panel chosen by the judges and, if substantial errors were found, or if the results seemed unjust, the cases were to be returned for new trial. Uniformity throughout the country was to be assured by a "supreme court of control" sitting in Moscow. Neither the latter nor the provincial review bodies ever met, however, as the District Courts were soon absorbed in a new general court combining elements of both systems.

No basic codes of law had been prepared for the new courts before they opened their doors. Only an outline decree on family law was issued in December 1917, followed by a full code one year later. In December 1918, a labor code was enacted to protect workers from employers. A few scattered decrees established particular crimes, but there was no written law defining murder, rape or theft as crimes. The first decree had authorized the simple people's courts to use Tsarist law that had not been revoked or did not violate "revolutionary consciousness." The second decree authorized the more formal District Courts to use old laws to settle disputes left over from the past, but only those that had not been specifically revoked and did not conflict with "socialist justice."

The Commissar of Justice expressed the hope that in the course of applying the provisions of the new decrees, the new judges would create material for new codes. In effect, he favored development of a "common law," to be followed by codification. He noted that in reading the cases he found some strange and absurd decisions, but he thought most of them based on life rather than on "moldy folk wisdom." It seemed to him that judges were establishing the rules for a new society.

Here are a few examples of how "socialist conscience" operated in the court room: In a divorce action a wife complained that she was unable to return to her husband, and that the village communal society had ordered her father to pay damages to the husband in the amount of 1500 rubles. At the trial, the husband consented to divorce if the damages were paid. The court granted the divorce, but refused to give effect to the village community's order.

A peasant sued the village communal society for damages caused to his crops by the society's animals. The suit was dismissed because the court thought that the plaintiff had failed to prove damages by the society's animals rather than by an animal belonging to a single individual. Further, the plaintiff had not kept his fence in repair, thus proving negligent in protecting his own property. But a contrary result followed when one Kormakov sued for damage to his oat field. The court believed the testimony of witnesses—the village herd had pastured near the plaintiff's field, and hoof prints had been found leading from the oats to the animal.

A horse trade was the cause of a dispute involving alleged fraud. One horse had been traded for another, plus ninety rubles cash. The original owner of the more valuable animal then demanded its return, claiming that the beast he received was weak and emaciated. The defendant admitted this, but claimed it was the result of poor care by the new owner. The court decided that unfair advantage had been taken in the trade by the original owner who knew of the weak condition and had sought to "sweeten" the deal by throwing in ninety rubles. He had also influenced testimony at the trial. The deal was set aside, and the offending party was ordered to pay 20 rubles costs and the court fee.

By the summer of 1918 evidence of the direction in which the courts were moving was so great that the Commissar of Justice decided that it was time to come up with new decrees and regulations. On July 20, 1918, a third decree on the courts was issued, reducing the jurisdiction of the

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District Courts and enhancing that of the simple people's courts. The latter could now hear civil cases involving claims up to 10,000 rubles, and try crimes for which law or "socialist consciousness" authorized penalties up to five year's imprisonment.

The third decree made inroads on yet another institution—the "revolutionary tribunal." These bodies, whose task was to smash efforts to unseat the regime, had emerged in various communities after the revolution, and had been sanctioned by the first decree on the courts. The revolutionary tribunals were often vindictive in passing out sentences against the upper classes of the old regime, not because of any overt current acts, but because of their alleged acts—or even social positions—before the revolution. Legal considerations played no role—the men and women on the bench simply acted as their prejudices dictated. Reborn in new surroundings were the tribunals of the French Revolution.

In order to remove some of these abuses, the third decree curbed the jurisdiction of the revolutionary tribunals over bribery and black marketeering. Orderly prosecution was henceforth to be the job of the District Courts. At a time when revolutionary fervor was at its height, this move was the first effort on the part of the Commissar of Justice to bring order out of chaos.

Simultaneously with the third decree, the Commissar of Justice issued the first instruction on court procedure, the purpose being to provide guidance for the new courts in the conduct of a case. The appearance of the instruction followed an early spring meeting in 1918 which had been called to study the need for procedural guidance, and which resulted in the issuance of a "temporary instruction" for the simple people's courts, which lacked all guidance. The District Courts were exempted inasmuch as they had been authorized by the second decree to follow Tsarist law unless it violated the "concept of justice" of the "toiling classes."

The new rules for the simple people's courts provided for the creation of an investigating agency to help the judges, some of whom had complained that they had no time to make the necessary investigations into criminal matters. While such an agency had existed in the District Courts for complicated cases, the judges in the people's courts had been expected to conduct their own preparation. Now the simple courts were to be furnished with assistance, but the investigators could not initiate prosecution without the consent of the judge.

A major feature of the new rules was the authorization of a judge to initiate his own proceedings. He was instructed to call a citizen for questioning if he sensed a violation of law, or if a member of the local soviet or state official requested that court proceedings be instituted. When a case was brought to trial, it had to be accompanied by a dossier including the substance of the interrogation, the facts determined from introduction of evidence, and the accusation. Here were the seeds of what later came to be an indictment. A system of summons was established for interested parties, and detailed steps were described to be followed when the trial opened.

Yet the new rules still embodied the urge to preserve simplicity. The draftsmen instructed the people's courts to accept no cramping of activity because of formal considerations; to admit any evidence they wished and to demand it of any persons holding such information. In effect, the substance of the second decree of February 1918 had become the rule for the simple people's courts as well as for the more sophisticated District Courts. This was more evident with regard to court costs, which were made similar to those previously established for the District Courts.

In the summer of 1918 the Russian Communist Party published a handbook outlining the minimum legal knowledge required of people's court judges. Although labelled an "unofficial guide," it provided the texts of the civil and criminal laws to be applied by the judges. The Commissar of Justice, in an introduction, reminded his readers that the court was losing its pre-revolutionary "formalistic" character, and that the time was rapidly approaching when courts would be able to dispense with any formalities whatsoever. Yet events were to belie his prophecies, for only a few years later, in his new capacity of Chief Justice, he was to be enforcing quite formal rules of procedure.

The people's court had no professional prosecutors or members of a bar to guide them. The first decree abolished the professional bar of old Russia, as well as the pre-revolutionary system of prosecutors and court investigators. All three institutions were destined to reappear, however, as it became increasingly evident that the "people's judges" could not function without help. Business was increasing and not all of it was of a criminal nature. Civil cases increased six times in Moscow between January and June, 1918, while criminal cases doubled in the same period. By autumn of 1918 there were 3,267 local people's courts in the Russian Republic, and 337 "congresses" of people's judges hearing appeals in review of their work. Clearly, this volume of business required new manpower.

In order to help clear up the backlog of cases inherited from pre-revolutionary times, the second decree had permitted lawyers to serve in the District Courts. The courts were authorized to receive aid from professional accusers although these professionals were not yet functioning as state prosecutors. They were to be selected from the members of the local bar, who held together in spite of the abolition of their Tsarist organization. To provide some

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control over this group each local soviet was instructed to organize a "college" in which it could enroll lawyers, and from which they could be dismissed at will. Courts or individuals were permitted to draw upon these colleges for assistance, but nonmembers could also be used if they received no payment. Since former bar members refused to accept assignments as prosecutors, the colleges attracted former military jurists, military judges, and erstwhile assistants to military prosecutors. Sometimes the courts called upon members of the local soviets who had no legal training whatsoever to take over the functions of prosecutors

Under these circumstances, it is not surprising that lawyers fared badly with the lay judges. Reminiscences reveal that fulltime judges were often attacked for availing themselves of the services of "windbags" and "hired consciences." Nevertheless, since relatives of the accused offered little help, the lawyers continued to function. In June 1918, a general meeting of Moscow judges adopted a resolution in favor of establishing a college of legal defenders, with control over their fees to prevent "exploitation." Shortly thereafter, practice before local courts was restricted to members of the "colleges," whether paid or not, although relatives were permitted to appear.

Disgruntlement over the system of payment grew, and soon the lawyers began demanding to be paid on a salary basis. Not until the enactment of a general People's Court Act on November 30, 1918, however, did the state meet the lawyers' demands. The Act, which reflected the Commissar's dream of a single court of great simplicity, liquidated the District Courts, and left the simple people's courts as the nucleus of the new judicial system, giving the latter exclusive jurisdiction over all civil and criminal cases, except those of a political nature. Political offenses continued to be tried by revolutionary tribunals, which made no pretense of being courts of law. Reference to Tsarist law was forbidden, and the judges were to apply only the new law. In trying offenses not covered in the new legislation, they were to be guided by their own "socialist concept of justice."

A section of the new act established a "college of defenders, prosecutors and representatives of the parties in civil suits." The bar became salaried and its members were available to the court on request, although a litigant could still introduce his family relative as his voice at the trial. The court could deny a criminal defendant's request for an attorney in all but serious cases. If the prosecutor appeared, the position of the accused was to be balanced with aid provided to him.

While there was to be but a single court, it was to have specialized chambers. Serious criminal charges were to be heard by a fulltime judge and his two lay assistants. The latter were to be equal to the fulltime judge, and were to decide questions of fact and law. Decisions were to be by majority vote. Yet judges were not completely shorn of their power, being permitted to gather and present evidence on their own even in civil cases.

The Act was a reaffirmation of the early faith in the primitive tribunal: No rules of procedure were to be applied to enforce a burden of proof on the parties. Review was permitted by the same "congress" of judges as before, but now it was to be called a "council." The councils were to function in provincial capitals, and their members were to be named by the general meeting of judges. To preserve political control, the selection had to be confirmed by the executive committee of the provincial soviet. The decree was also significant in that it suggested reversal for procedural violation. It stated that a new trial might be required "in the event that there are to be found substantial violations or incorrect applications of decrees, especially violations of court procedure, and also in the event that the investigation has been incomplete."

The new court policy was reflected in the Communist Party's program of 1919: "The Soviet Government has replaced the former endless series of courts of justice with their various divisions, by a very simplified, uniform system of People's Courts, accessible to the population, and freed of all useless formalities of procedure." The Commissar exulted: "Neither Roman law nor subsequent bourgeois law gave such authority to a judge. Perhaps we can find some analogy in more ancient primitive law."

Yet, centralization of policy-making was about to begin, and with it the end of both simplicity and popularity. In an article published in 1919, the Commissar of Justice listed the separate statutes adopted during the first seventeen months of Bolshevik reign, grouping them as if they had been articles of a code. Murder and other crimes against the individual were mentioned, though there were no statutes defining these crimes. Codification had not yet begun, but it was clearly in the offing. The article listed some decisions which the Commissar found desirable. For example, he approved of a sentence penalizing a man who had corrupted a young girl whose apartment he shared with her family, even though there were no witnesses to the alleged corruption. Similarly, he approved of a lenient penalty for a soldier who had murdered another in a brawl since the soldier had pleaded guilty, there had been no premeditation, and he had been intoxicated during the act. In another case, although a man had been found with a bomb and a revolver in an apartment, he was acquitted of a robbery charge. It was proven that he was an idealistic anarchist seeking to requisition a room for himself and thus was responsible only under a lesser charge.

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The Commissar recounted a suit of maintenance brought by a common-law wife and her abandoned child, which resulted in a recommendation for a civil decision. The defendant had left to join another woman. Judgment was given, but costs denied because the court thought it an unfair burden to require the defendant to do more than support the two families. The Commissar, referring to these and several other decisions, waxed enthusiastic: "These decisions," he exclaimed, "are shot through with unhindered imagination."

Centralization was hastened by the civil war. Of the strict measures that were introduced early in 1919, two were particularly noteworthy: the permission for the *Cheka,* as the strong arm of the security police, to work without judicial control; and the publication, on December 12, 1919, of a "basic aid" in criminal law. The "aid" defined the criminal law's function and established the matters to be considered in determining punishment. These features were later, in expanded form, to become the "general section" of the first criminal code of 1922.

As time went on, the Commissar of Justice became increasingly restive about the lack of uniformity in the people's courts. Even statistics were lacking, he complained in a January 1920 circular. In June of that year, representative officials from all branches of judicial administration met to discuss their common problems. They proposed the establishment of a more centralized procedure in appointing and recalling judges, the creation of "special sessions" and of a new "standing court" of the people's courts, and a reorganization of the bar. The standing court was to speed proceedings by hearing cases where no preliminary investigation was necessary as soon as they came up. The "special sessions" were to absorb some of the more politically dangerous cases concerning massive speculation in rationed goods, serious crimes by officials, military exemption and illegal traffic in liquor. The "special sessions" were also the forerunner of a hierarchical court system which was to try crimes of differing degrees of social danger.

The reforms were introduced provisionally by an August 1920 instruction also establishing a gradation in the investigating apparatus based on the danger of the crime. On October 21, 1920, a new People's Court Act rounded out action on the proposals. The prosecutors, who hitherto had been members of the bar, were now organized for the first time as an independent professional prosecuting staff. The bar itself was greatly expanded and became a long list of persons on a panel. The system of payment was abolished, and panel members had to serve as a labor duty when called; if they refused, they faced prosecution. Public service was in the air, and performing the duties of a lawyer was considered as important a contribution to society as the service of a lay judge.

By late 1920 victory in the civil war seemed assured, and the regime began to pay attention to tasks of reconstruction. In the judicial field the striking event was the creation of a department of the Commissariat of Justice to serve as a supreme court of the Russian Republic. It was authorized to set aside lower court decisions that represented a clear violation of, or a failure to enforce, the law, and to clear up conflicts between court decisions and the general policy of the government. Review was not by appeal, but on the initiative of the Commissariat, of agencies of the central government, or of a provincial executive committee. Private individuals desiring to have standing before the new court had to file a complaint with one of these agencies. The official explanation of this move was that the decentralization of the appellate process required a corrective in the form of centralized leadership.

The introduction of the New Economic Policy in 1921 brought forth a wave of new reforms and innovations: the creation of a civil code, inspired by the need to obtain necessary investments from abroad; the creation of the office of Prosecutor of the Republic to facilitate control over the emerging bourgeoisie; a restructuring of the bar along more traditional lines (though subject to control by the provincial soviets); and finally a change in the police system, beginning with the transfer, in February 1922, of the function of the security police to the courts and to the revolutionary tribunals, followed by the court reform of November 11, 1922, abolishing the tribunals altogether. The latter step was particularly pleasing to the then Chief Republic Prosecutor, Nikolai V. Krylenko, the architect of the reform, who saw in it an end to the duality of the past, and the emergence of a unified single court system, headed by a Supreme Court and fully divorced from the Commissariat of Justice.

Duality had been overcome, but at a high cost to the dream of popularity, because the courts had now become politically sensitive in absorbing the political cases. The early vision of simplicity was also rapidly evaporating: a set of new courts was established in November 1922, called military and military transport tribunals. The former had jurisdiction over all that endangered the Red Army, and the latter were to try crimes endangering transportation. Shortly thereafter came special courts dealing with violations of the labor code. All three courts were to be composed not of rotating lay judges, but of fulltime participants—thus dealing a blow to the other early vision, that of popularity.

Krylenko was fully conscious of the implications of these moves, but he defended them on grounds of practicality: "This is a screaming defect in

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that it pulls down the whole system," he declared, "yet there is no other way practically to handle the problem." He sought to avoid the danger that the new procedure would engender bureaucratic terrorization by subordinating the new specialized courts to the new Supreme Court of the Republic.

Legal research and training, too, felt the breath of the new era: an Institute of Law was established at the end of 1920, and the first issue of its journal came out in May 1922. Another journal made its appearance shortly thereafter, devoted to practical—rather than theoretical—problems of Soviet law and legality. It was edited by pre-revolutionary lawyers wishing to adapt their legal inheritance to the political exigencies of the day.

Yet the exigencies were far from simple, for on the one hand the regime was committed to a policy favoring the workers and the peasants, while on the other it faced the necessity of providing some protection to the new capitalist class so as to make the NEP work. In practice, favoritism to workers consisted in eliminating the economic base from which the bourgeoisie was supposed to derive political power—*i.e.*, private ownership of productive property. Hence the land, factories, banks, insurance companies and apartment houses were completely nationalized. At the same time, however, the bourgeoisie was given the right to own private dwellings and to engage in small-scale merchandising, and this ownership required legal protection.

The latter step could not but arouse the more pristine Bolsheviks, who accused the regime of having capitulated to the capitalists. Krylenko answered the charge by declaring that those who blamed the NEP for the legal reforms of 1922 had improperly evaluated the events of 1917. The revolution, he stated, had not rejected law in general, but only those of its aspects that favored the capitalist system. Law could serve the new regime, too, and "the NEP provided only the atmosphere, facilitating, it is true, and hastening the exposure of this inescapable phase of development of our court work, but it never did more than that. It never foreordained the content of the work."

The steps toward creating a federated political system, which were started toward the end of 1922 and which resulted in the formal ratification, in January 1924, of the new Constitution of the Union of Soviet Socialist Republics, further affected the early conceptions of socialist law. A new Supreme Court of the USSR was created in 1923, whose purpose was to supervise and coordinate the activities of the various Republic Supreme Courts. The military and transport tribunals, which hitherto had been under the jurisdiction of the Republic Supreme Courts, were now transferred to the USSR Supreme Court. The new constitution also authorized the federal government "to establish the fundamentals of structure of the judicial agencies and of judicial procedure," which it proceeded to do by enacting fundamentals of criminal procedure on the Russian Republic's model.

The reforms that were slowly changing the political and legal order of the Soviet state could not continue very long without a concomitant attempt to provide them with an ideological justification. Chief among the legal scholars performing this task was Evgenii B. Pashukanis, who declared that the new proletarian state must utilize bourgeois legal forms but fill them "with socialist content." He expected law to wither away eventually along with the state, and a new classless society, needing neither bourgeois or socialist law, to come into being.

As events in the late 1920's and early 1930's were to affirm, none of the utopian views propounded either in the year of the revolution or during the NEP period conformed to the plans which Stalin had in store for his monolithic empire. As the late dictator consolidated his power, not only were the early dreams of simplicity and popularity completely abandoned, but those who had voiced and tried to preserve them were, with the passage of time, arrested and executed. True, some of the legal forms they had helped to create in the early 1920's were retained, only to be used against workers and peasants and even against Communist Party members, rather than against those wily members of the bourgeoisie who had ostensibly sought to harm the socialist state. Stalin's influence upon the legal system, which mocked the very ideas of the founders of the Soviet state, lasted till well after his death.

The early revolutionary and post-revolutionary period has become a chapter of history—a curious and interesting chapter, and one that still exerts some influence today. While simplicity and popularity disappeared in the regular courts, they are still being sought elsewhere. The revival of interest in the social courts and in the substitution of a code of morals for law suggests that some of the ideas of the past continue to live on.[2]

[2] See articles by Leon Lipson and Alfred Boiter elsewhere in this issue.—*Ed.*

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Rights and Duties of Citizens

By George Ginsburgs

The question of the constitutional rights and duties of Soviet citizens, a subject that was well-nigh taboo under Stalin, has in recent years regained respectability and again commands serious attention in the USSR. The denunciation of the "cult of the personality," the ensuing relaxation of political controls, and the adoption in 1961 of the new party program with its promises of further "liberalization" of Soviet life, not only rekindled general interest in the topic but produced also a good deal of learned commentary in Soviet publications.

Since the Bolshevik Revolution, Russia has had three sets of constitutions. Each marked a distinct historical stage in the development of the Soviet regime and in the evolution of Soviet legal doctrine and administrative practice. The 1918 Constitution of the RSFSR, and its counterparts in the other Soviet republics, established the basic principles of the new state structure and furnished the grand outline for what was officially described as a totally different, "socialist" political organization of the community. The purpose of the 1924 Constitution of the USSR was more mundane: its chief aim was to draw up the formal blueprint for the federal union into which the erstwhile alliance of nominally independent Soviet states had just been transformed.

The Constitution of 1936, finally, reflects the profound changes wrought in the USSR since Lenin's death. Stalin's rise to power, the ascendancy of his personal policies and the ultimate triumph of his views on the collectivization of agriculture, forced industrialization, the elimination of the private sector of the economy, bureaucratic centralization, the successful extermination of the "class enemy"—all found expression in the document later to be known as the "Stalin Constitution." Despite the devastating posthumous criticism of Stalin's rule by his political heirs, his charter still serves as the basic law of the land. It is now scheduled to be replaced by a new Constitution designed to take into account social developments of the past decade, such as the political "thaw" and the

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major economic and administrative reforms. When this project, initiated by Khrushchev, will come to fruition remains, however, an open question.

The Early Constitutions

Thus far, Soviet constitutional documents have given little prominence to the rights and duties of the individual. The 1918 Constitution of the RSFSR did not even feature a separate chapter on that subject; instead, isolated references to individual rights and duties were scattered throughout the body of the text. Paradoxically, Part I of that Constitution consisted of the famous "Declaration of Rights of the Toiling and Exploited People" approved by the Third All-Russian Congress of Soviets in January 1918, but, in spite of its title that proclamation did not concern itself with the status of physical persons. It merely set forth the social, economic and political goals of the "working class" as interpreted by the Bolshevik leadership, which the party thereupon set about "realizing" through the medium of a totalitarian state machine it was fashioning for that purpose.

Thus the Declaration's conceptual fabric alone excluded the principle of individual liberties. The enactment, it was aptly observed at the time, "serves as an example not of a limitation upon but of an incredible extension of, the power of the state."[1] Soviet sources themselves in those early days admitted almost as much. "At bottom, the question here is not one of rights at all, but that of enumerating the tasks of the socialist regime," declared a Soviet writer in 1923.[2]

As regards individual freedoms then, the effect of the Declaration was wholly negative. Only two of its provisions need be specifically mentioned in the present context; typically, both circumscribed the rights of the citizenry. Article 2(f) established the "universal obligation to work with the aim of eliminating the parasitic strata of society and organizing the economic life of the country." (Today's constitutional injunction of the "duty to work" traces its ancestry directly to that clause.) And Article 7 laid down the rule that "the exploiters shall not hold a position in any branch of the Soviet Government." The Declaration thus set forth the class character of the Soviet political system and clearly heralded the differential treatment the state would apply to different social strata of the population.

The identification of individual rights and duties elsewhere in the 1918 RSFSR Constitution followed a more orthodox pattern. Included in the catalogue of civil liberties were the freedom of conscience, entailing the separation of church and state and predicated on each man's right to engage in religious or anti-religious propaganda; freedom of the press; freedom of meeting and association; the right to education; and the equality of all citizens irrespective of their racial or national origins. Only two duties were listed: again, the obligation of every citizen to work pursuant to the motto "He who does not work neither shall he eat;" and the obligation of all citizens to defend the fatherland, the honor of bearing arms being reserved solely to the workers.

Finally, a closing omnibus clause deprived "all individuals and groups of any rights which could be utilized by them to the detriment of the socialist revolution." What this meant was perhaps most vividly illustrated by the Constitution's treatment of the right to vote and to be elected, exclusively granted to "toilers" and denied to all others. By the same token, however, "in the spirit of the solidarity of the workers of all nations," all political rights of Russian citizens including the electoral rights, were forthwith granted to foreigners "who live in the territory of the Russian Republic and are engaged in work and belong to the working class." The contemporary constitutions of most of the other Soviet republics closely conformed to the RSFSR model.[3]

The next Soviet constitutional period was inaugurated by the 1924 Constitution of the USSR which completely ignored the problem of the rights and duties of the individual. At the same time, the various republican constitutions, enacted on the basis of the first federal charter, generally confined themselves to repeating the formulas of the 1918 Declaration or reaffirming their adherence to the principles which it embodied—this in spite of the many

[1] B. Mirkine-Guetzevitch, *La Théorie générale de l' Etat soviétique*, Paris, Marcel Giard, 1928, p. 96.

[2] M. A. Reisner, *Gosudarstvo burzhuazii i RSFSR*, (The State of the Bourgeoisie and the RSFSR), Gosizdat, Moscow-Petrograd, 1923, p. 333.

[3] The constitutions of the People's Soviet Republics of Bukhara and Khorezm differed markedly from the RSFSR prototype in that they featured several guarantees of personal freedoms, *e.g.*, the right to property and inheritance, inviolability of the person, etc., absent from the model document. There is great doubt, however, whether these "liberties" were ever enforced and, in any event, the constitutions themselves lasted but a short while and now have only historical interest. *Cf.* D. A. Magerovskii, *Soiuz Sovetskikh Sotsialisticheskikh Respublik (Obzor i materialy)*, (The Union of Soviet Socialist Republics, Survey and Materials), Moscow, Yurizdat, 1923, p. 60.

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policy changes that occurred in the meantime, such as the recognition of private inheritance and property rights. There may still have been some official uncertainty as to how lasting the concessions of the NEP (New Economic Policy) era might be, and it was probably thought best not to elevate them to the status of formal constitutional freedoms prematurely.

Paper Rights

In any event, by 1936 Stalin had made up his mind about most of the issues that had been left unresolved in 1924. He assumed total power in the state but he also made sure that the new Soviet Constitution contained a lavish and explicit statement of the rights and duties of Soviet citizens. The constitutions of the Union republics reproduced it almost verbatim. The Fundamental Law of 1936 thus incorporated a number of departures from established precedent. To begin with, it stated that "alongside the socialist system of economy, which is the predominant form of economy in the USSR, the law permits the small private economy of individual peasants and artisans based on their own labor and precluding the exploitation of the labor of others." In the same vein, it enunciated the rule that

The personal property right of citizens in their incomes and savings from work, in their dwelling houses and subsidiary home enterprises, in articles of domestic economy and use and articles of personal use and convenience, as well as the right of citizens to inherit personal property, is protected by law.

But accompanying these new freedoms was the old injunction that "work in the USSR is a duty and a matter of honor for every able-bodied citizen, in accordance with the principle: 'He who does not work, neither shall he eat.'" This old maxim was now further amplified by the "socialist" principle, "From each according to his ability, to each according to his work."

The chapter on "The Courts and the Procurator's Office" also contained an innovation: the right of an accused to defense counsel in trial proceedings. Next, the chapter devoted to the "Fundamental Rights and Duties of Citizens" featured several new concepts elaborated earlier through ordinary statutory channels and now for the first time promoted to constitutional rank. These novel elements included the right to work, i.e., "the right to guaranteed employment and payment for . . . work in accordance with its quantity and quality," the right to rest and leisure, the right to maintenance in old age and also in case of sickness and disability. The right to conduct anti-religious propaganda was preserved as was the freedom of religious worship, but the corresponding right to engage in religious propaganda was omitted. Freshly added to the roster of freedoms was a guarantee of the "inviolability of the person," pledging that no person could be "placed under arrest except by decision of a court or with the sanction of a procurator," as well as a guarantee of the "inviolability of the homes of citizens and the privacy of correspondence."

The new Constitution also formally extended to all Soviet citizens—except for persons medically certified as insane or those convicted by a court of law and sentenced to a suspension of electoral rights—the right to vote and be elected; in fact, the practice of depriving certain categories of persons of electoral rights on grounds of social extraction had been abolished some years earlier. On the other hand, all foreigners domiciled on Soviet soil now lost their local political rights, which previously they had exercised on a par with their Russian class comrades. The revolutionary internationalism of the past was thus supplanted by orthodox national exclusiveness in establishing prerequisites for participation in the community's political processes.

The list of duties was also expanded somewhat. The 1936 Constitution enjoins "every citizen of the USSR to abide by the Constitution. . . , to observe the laws, to maintain labor discipline, honestly to perform public duties, and to respect the rules of social intercourse." Furthermore, every citizen is expected "to safeguard and fortify public, socialist property as the sacred and inviolable foundation of the Soviet system, as the source of the wealth and might of the country, as the source of the prosperity and culture of all working people."

Otherwise, the official catalogue of the constitutional rights and duties of Soviet citizens remained unaltered. For the great progress supposedly achieved in the USSR since the 1917 Revolution, the changes were far from spectacular, even going by the bare letter of the law alone. Substantively, the development was of course regressive, given the actualities of Stalin's rule. Here lies perhaps the greatest irony of Soviet constitutional history—that the introduction of formal, explicit "constitutional rights" coincided with a reign of terror that made a mockery of the very idea of law itself. Like most of the other promises of the 1936 Constitution, the majority of the individual-rights guarantees had to await the death of the

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statute's author before they were to acquire even a modicum of reality.

A further observation may be made in this connection. Soviet publicists forever delight in drawing invidious comparisons between the extensive freedoms formally guaranteed to Soviet citizens, and what they term the "rights-less" position of the "masses" in "bourgeois" countries. Yet it is a matter of record that all but two of the "liberties" proclaimed with such fanfare in the most advanced Soviet Constitution to date are well known to the Western world, where indeed they originated. The sole exceptions are the specific right to conduct anti-religious propaganda, which elsewhere is generally covered by the guarantee of free speech, and the so-called "right to work." On closer examination, though, the latter right, which in Soviet literature is always depicted as quite the most important among the rights of the individual,[4] turns out to be no more than a doctrinal commitment to a socio-economic policy of full employment.[5] True, it has legal dimensions too, expressed, for instance, in legal safeguards against dismissal from a job without proper cause, but these can hardly be thought of as something new. Elsewhere, organized labor and collective bargaining have accomplished as much, often very much more, without erecting constitutional landmarks under such impressive-sounding labels as "right to work" and "right to rest and leisure."

Prospects Ahead

As for prospective constitutional development in the USSR, little innovation may be expected in the near future if the current discussions revolving around the plans for a new Soviet Constitution are any indication. So far, the proposals for reform in the area of individual rights have been few and inconsequential. For example, it has been urged that "it would be advisable and politically desirable to place the chapter on the basic rights and duties of citizens at the beginning of the Constitution, after the chapter on social structure. . . ," for such a change "would fully correspond to the decisive role of the popular masses in the building of communism underlined in the decision of the 20 and 21st congresses of the CPSU as well as . . . reflect the incessant concern of the party and the Soviet State for the people."[6] In this view, at any rate, the present position of the chapter dedicated to the rights of the individual—it occupies the tenth place in a total of thirteen chapters—is no longer considered to be indicative of the relative importance of these principles within the hierarchy of Soviet constitutional norms.

Next, it has also been suggested that all the basic rights and duties of the citizen, some of which have hitherto been scattered throughout the Basic Law (for instance, the right to private property, the right to elect and be elected to public office), be concentrated in a single chapter. Other proposals call for specific confirmation in the new Constitution of the 7 and 6-hour working day, and of the right of the individual to health protection, free medical care, comfor-

[1] See, *e.g.*, O. V. Smirnov, *Priroda i sushchnost prava na trud v SSSR*, (The Nature and Essence of the Right to Work in the USSR), Moscow, *Yuridicheskaia literatura*, 1964, pp. 1 ff; A. I. Lepeshkin, *Kurs Sovetskovo gosudarstvennovo prava*, (Course of Soviet State Law), Moscow, Gosiurizdat, 1961, Vol. 1, pp. 490-91.

[5] See, for example, the enlightening discussion of this point by the Polish jurist W. Szubert, "Garanties juridiques du droit au travail," in *Rapports Polonais Présentés au Sixième Congrès International de Droit Comparé*, Polish Academy of Sciences, 1962, pp. 156-171.

[6] D. A. Gaidukov, "O razvitii konstitutsii SSSR v svete reshenii XXI sezda KPSS" (On the Development of the Constitution of the USSR in the Light of the Decisions of the 21st Congress of the CPSU), *Sovetskoe gosudarstvo i pravo* (Moscow), 1959, No. 9, p. 115.

Caption upper right: Labor for the good of society—the sacred duty of every person. (From the draft program of the CPSU.)
Sign over dam: He Who Does Not Work Does Not Eat.
Caption below: Against the current.

—From Krokodil (Moscow), Oct. 20, 1961.

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table living quarters, leisure, and free care for children in children's homes, creches, schools and boarding schools.

One potentially truly meaningful suggestion is the proposal that the Constitution formally recognize that the "citizens of the USSR have the right to address complaints and demands to state organs against officials who by their action or inaction violate or fail to abide by the requirements of socialist legality."[7] Thus far, only regular legislation has proffered the Soviet citizen the right—and not very effectively—to complain against maladministration.[8] Of equal importance may be a companion proposal suggesting that the future Fundamental Law declare that "no one can be found guilty of having committed a crime and subjected to criminal punishment except by a verdict of a court, based on the law,"[9] a formula aimed at giving constitutional endorsement to the regime's current emphasis on "socialist legality."

As to the duties of individuals in the years ahead, the only proposal worth mentioning so far is the suggestion that a provision be included in the new Constitution requiring the citizens "to educate the coming generation in the spirit of Communist morality and consciousness of its civic duties."[10]

The Limits of Theory

All in all, interesting as some of these proposals may sound, they do not portend a signal breakthrough in Soviet legal theory and practice—even though, cumulatively, they could affect the complexion of relations between the rulers and the ruled in the USSR. To explain this conclusion it is necessary to consider briefly the value and origin of constitutional guarantees of individual liberties in Soviet society. The Marxist ethos, which dominates the philosophical code of the Soviet State, views man purely as a product of his physical environment, molded by the interplay of external forces, and reflecting in his person the sum total of his social (class) experiences. In the context of this theory there is no room for any natural or innate, or inalienable rights of man. Only society gives birth to rights. Technically, positive law generates them, infuses them with substance and validates them. Or, as one Soviet author, writing in the early years of the Communist regime, preferred to put it,

The state alone is the source of the personal rights of the individual, the state alone is the source and creator of all legislation, for the state alone creates what is known as objective law, i.e., the complex or norms which regulate society. The fundamental principle of our legislation and our private law, which bourgeois theories will never recognize, is that everything which is not authorized is not permitted, [for], contrary to the European doctrine, we affirm that the repository of power, the source of law, is the state, not the individual.[11]

At the present time, Soviet spokesmen might not state the thesis quite so bluntly, but basically they still subscribe to it. Under the Soviet system, then, personal liberties remain to this day creatures of legislative discretion, conditional rights which can always be modified, curtailed, or, for that matter, abolished altogether by statutory action. Clearly, what the state may bestow, it may also take away, or withdraw temporarily, or alter in part, or completely recast.

To be sure, all this is not to say that a materialist conception of life automatically leads to an ingrained disregard for civil liberties. The point is simply that in a state dominated by such a philosophy, where the individual is not considered endowed with inalienable rights and where personal liberties are simply a subject of social policy, civil freedoms may be easily abrogated through "duly enacted" positive legislation. In such a state, arbitrary action by the political leadership in the field of civil rights will not meet with objections on philosophical grounds; it can only meet with political protest, which under the totalitarian one-party regime in the USSR is not likely to occur.

A corollary implication of Soviet Marxism is the proposition that not only does the State

[7] P. S. Romashkin, "Novyi etap v razvitii Sovetskovo gosudarstva," (New Stage in the Development of the Soviet State), *Sovetskoe gosudarstvo i pravo* (Moscow), 1960, No. 10, p. 39; and D. A. Gaidukov, *op. cit.*, p. 114.

[8] See the excellent analysis of this and related questions in D. A. Loeber, "The Soviet Procuracy and the Rights of the Individual Against the State," *Journal of the International Commission of Jurists*, 1957, No. 1.

[9] V. Kotok and D. Gaidukov, "Novyi etap v razvitii Sovetskovo gosudarstva i konstitutsii SSSR," (New Stage in the Development of the Soviet State and the Constitution of the USSR), *Sovety deputatov trudiashchikhsia*, 1959, No. 8, p. 26.

[10] P. S. Romashkin, "Novyi etap razvitiia Sovetskovo gosudarstva i voprosy konstitutsionnovo zakonodatelstva," (The New Stage of Development of the Soviet State and Questions of Constitutional Legislation), in *Ot sotsialisticheskoi gosudarstvennosti k kommunisticheskomu obshchestvennomu samoupravleniiu* (From Socialist Statehood to Communist Social Self-Management), USSR Academy of Sciences, 1961, p. 193.

[11] A. Malitskii, *Sovetskoe gosudarstvennoe pravo (Ocherki)* (Soviet State Law, Essays), Kharkov, Yurizdat, 1926, p. 14.

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entirely of its volition establish what the rights and duties of the individual citizen shall be at any given moment, but that it is strictly up to the political authorities to determine the substantive content of these rights and duties. In other words, ordinary legislation must lend reality to the constitutional principles; by themselves, the latter do not constitute any immutable rules, do not possess an irreducible minimum of objective content. They may never be abstracted from the particular piece of legislation that purports to implement them, for the two are organically inseparable: without the singular statute or decree, the constitutional formulas concerning "personal freedoms" are empty phrases which only an appropriate enactment can fill with purpose.

What this connotes, of course, is that Soviet legal theory and practice rule out *a priori* any possibility of collision between a constitutional provision sanctioning an individual right and a legislative act determining the effective scope of that right. Since every constitutional clause requires enabling legislation before it can be applied, it is by definition held to mean exactly what current legislation says it means. No institutional barriers stand in the way of promulgation of any measure sponsored by the government, regardless of its import. No higher standards are available by which to pass judgment on the validity of any piece of legislation, since the language of the Constitution itself is bereft of any intrinsic meaning.

Even in theoretical terms, therefore, it makes no sense to talk of an overt challenge to a duly enacted statute on grounds of its "substantive unconstitutionality." For everyone in the USSR is expected to proceed on the assumption that, "in the Soviet State, where law is the expression of the will of the people, the possibility of issuing an anti-democratic law restricting the rights and freedoms already won by the people is precluded."[12] Stripped of the fancy verbiage this simply means that whatever content a legislative act chooses to attribute to a constitutional prescription dealing with individual liberties, that happens to be the correct and constitutional interpretation at the moment.

How Much Progress

Under these circumstances, the provisions of the 1924 and 1936 constitutions (Arts. 20, 30, 31, 43(b), 58, 59 and 63, in the former; Arts. 49(f), 69, 82 and 97, in the latter) which imply the nullity of legislative and quasi-legislative measures that run counter to the Fundamental Law must be read in a special light. First, they can engender merely administrative action, empowering the higher echelons of the bureaucracy to exercise control over objectionable orders emanating from subordinate departments by vetoing or suspending them, while granting the parallel structure of the procuratorial pyramid the power of "general supervision" of administrative acts through "protests" and "proposals"; no citizen, however, can have direct recourse to any such remedy. Second, no evidence can be found to show that any piece of Soviet legislation has ever been struck down or even protested by the procuracy because its substantive contents inherently contradicted a constitutional clause. Third, the constitutional provisions under review were intended to be used as a means of resolving procedural disputes involving conflicts of jurisdiction: where an organ of government or administration exceeded its authority or encroached on another agency's domain and thus violated the constitutional scheme for the distribution of tasks and allocation of functions. But even this application seems to occur very rarely.

In any event, none of these functions amount to what elsewhere is commonly accepted as an effective technique for checking upon the constitutional validity of legislative and administrative acts. As long as the private party, the individual whose interests are most vitally affected, is barred from initiating action and seeking redress on his own, no such arrangement can really work well. At least, it never has, so far, in the Soviet Union.

Nevertheless, there have been some significant improvements in the status of the individual in the USSR since Stalin's death. These, however, have all come about through reforms consummated at the sub-constitutional level, i.e., as a product of widespread revisions of Stalin's legislative heritage. What is more, the most fruitful of these changes have been brought about by what may be called "negative action" —repeal or suspension of Stalinist laws and administrative practices, resulting in at least partial rehabilitation of some of the principles embodied in the Constitution. The decision to curb the secret police, for example, has breathed life into the concept of "inviolability of the person," of "invoilability of the homes of citizens and privacy of correspondence," and of the right of the accused to defense counsel in a court of law: all principles that hitherto had a very hollow ring to them.

[12] Ts. A. Yampolskaia, "O subektivnykh pravakh sovetskikh grazhdan i ikh garantiiakh," (On the Subjective Rights of Soviet Citizens and Their Guarantees), in V. F. Kotok (ed.), *Voprosy Sovetskovo gosudarstvennovo prava*, USSR Academy of Sciences, 1959, p. 205.

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Not all the freedoms recognized by the current Basic Law have fared equally well in the post-Stalin era. Thus no noticeable progress has been made in guaranteeing the individual genuine political rights. In the field of socio-economic rights, a general trend for the better has been offset by various regressions. Advances registered with regard to the right to work, to cite one instance, have been badly overshadowed by the measures, concurrently introduced, enforcing "the duty to work," and by the record of the ensuing witch-hunt pressed against "parasites, vagrants and vagabonds." Several property rights have, in quick succession, undergone legislative expansion and restriction, and the ultimate fate of a number of other "rights" is as yet unsettled.

On balance, to be sure, the Soviet citizen today enjoys much more personal freedom than he ever has under the Communist order. His lot has improved, and it is likely to improve further. What remains to be seen is whether the current experimentation will leave an enduring imprint on the system itself. So far, the achieved progress in the USSR is due solely to *ad hoc* policy considerations and represents pragmatic concessions by the leadership to urgent social needs. These "popular" successes have not, however, been shored up by institutional safeguards to ensure their preservation. Of course, the latter in turn can accomplish little unless they themselves function in a political atmosphere favorable to their purpose. It is axiomatic that constitutional guarantees can be effective only where deep-rooted social tradition dictates respect for political proprieties. Such a community code cannot be developed overnight. Until it is, constitutional principles in the Soviet Union are destined to play but a limited role in affairs of state and the Constitution will continue to stand as little more than a mausoleum to dead hopes and unrealized dreams.

Party Supremacy: Some Legal Questions

By Boris Meissner

Prior to 1936, the dominant position of the CPSU in the Soviet State received no mention in the fundamental law of the USSR. "We are governed by a party . . . which our Constitution passes over in silence, but which nevertheless forms the legal and factual essence of this Constitution," wrote G. S. Gurvich, a Soviet constitutional lawyer, in 1922.[1] His colleague, S. I. Raevich, was just as explicit: "The Communist Party is the most important element in the real Russian Constitution." [2]

A clear enunciation of one-party rule as the principal factor of the political and legal system

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[1] B. Dennewitz, in B. Meissner (ed.), *Die Verfassungen der modernen Staaten* (Constitutions of Modern States), Hamburg, 1947, Vol. I, p. 126.
[2] *Vlast Sovetov* (Moscow), 1923, No. 10, p. 27.

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of the Soviet state came only in the second, so-called "Stalin Constitution" of the USSR, promulgated on December 5, 1936. Article 126 stated:

. . . . the most active and politically conscious citizens in the ranks of the working class and other sections of the working people unite in the Communist Party of the Soviet Union (Bolsheviks), which is the vanguard of the working people in their struggle to strengthen and develop the socialist system and the leading core of all organizations of the working people, both public and state.[3]

The Political and Legal Core of the State

The public and state organizations grouped about the party are termed "transmission belts" or "levers" in Soviet legal literature. Their task is to transmit the will of the party to the various segments of the population and at the same time create the impression that the party enjoys the confidence of the masses. Until recently, this complex system of party control was described as the "mechanism of the dictatorship of the proletariat" and equated with the "mechanism of the state in the wider sense." [4] According to A. S. Fedoseev,

The working class of the Soviet Union exercises governmental control over society with the aid of numerous state and public organizations of the working people, constituting together the system of the dictatorship of the proletariat or, which is the same, the mechanism of the Soviet state in the wider sense.[5]

Similarly, Ts. A. Yampolskaia:

The mechanism of the socialist Soviet state in the wider meaning of this term is the mechanism of the "dictatorship of the working class," . . . a system of public and state organizations of workers . . . engaged under the leadership of the Communist Party in solving the tasks of the state and participating in the exercise of state functions.[6]

Indeed, many Soviet writers on constitutional law have seen no substantial difference between the "state mechanism in the wider sense" and the Soviet state apparatus as a whole.[7]

A. I. Korolev, for example, comments as follows:

In the deeper sense of the term the Soviet state apparatus manifestly consists not only of state organizations (organs of state government and administration), but also of various public organizations of workers, party organizations and also organizations lacking a party character. The trade unions, cooperative associations, youth organizations and a considerable number of other public workers' organizations form an important component of the Soviet state apparatus in the deeper sense of the term.[8]

Different interpretations of the question have naturally appeared ever since the announcement in the new party Program of 1961 that the USSR has passed from a "state of the dictatorship of the proletariat" to a "state of the entire people" and the CPSU from the "vanguard of the proletariat" to a "party of the entire people." [9] According to A. I. Lukianov and B. M. Lazarev, for example, the state apparatus should be kept conceptually distinct from the mechanism of the state in the "wider sense." [10] The "politically organized society," as they envision it, comprises the mass organizations in their entirety, and not just their bureaucratic machinery. The Soviet state apparatus, on the other hand, embraces the totality of state institutions exercising the functions of the socialist state. To be sure, in some degree these functions are also exercised by the public or-

[3] Dennewitz-Meissner, *op. cit.*, p. 211. The Change of name decided upon at the 19th Congress of the CPSU in October 1952—KPSS instead of VKP (b)—led to an amendment of Art. 126 on August 8, 1953 (*VVS SSR*, 1953, No. 7).

[4] *Cf.* M. A. Arzhanov, *Teoriia gosudarstva i prava* (Theory of State and Law), Moscow, 1949; M. P. Kareva, F. S. Ketchekian, A. S. Fedoseev, G. I. Fedkin, (eds.), *Teoria gosudarstva i prava* (Theory of State and Law), Moscow, 1954; Ts. A. Yampolskaia, *Organy sovetskovo gosudarstvennovo upravlenia v sovremennii period* (The Organs of Soviet State Administration in the Current Period), Moscow, 1954.

[5] Fedoseev, *op. cit.*, p. 229.

[6] Yampolskaia, *op. cit.*, p. 6.

[7] *Cf.* Fedoseev, *op. cit.*, p. 231; N. B. Aleksandrov, F. I. Kalinitsev, D. S. Kareva, A. L. Nedavni, Va. Tumanov, A. F. Shebanov (eds.), *Osnovy teorii gosudarstva i prava* (Fundamentals of the Theory of State and Law), Moscow, 1956, p. 168; A. I. Korolev, "Voprosy sovetskovo gosudarstva i prava (Problems of the Soviet State and Law)," in *Uchenie zapiski* (Learned Notes), Leningrad University, Leningrad, 1955, No. 187.

[8] Korolev, *op. cit.*, p. 93.

[9] *Cf.* B. Meissner, *Das Parteiprogramm der KPdSU 1903 bis 1961* (The Party Program of the CPSU, 1903-1961), Cologne, 1962, pp. 103-106.

[10] *Cf.* A. I. Lukianov and B. M. Lazarev, *Der Sowjetstaat und die gesellschaftlichen Organisationen* (The Soviet State and the Public Organizations), East Berlin, 1963, p. 79.

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ganizations, notably the party, but the latter do not thereby lose their separate identity vis-à-vis the state apparatus.

There is indeed good reason to distinguish between the exercise of state functions by public organizations, on the one hand, and their autonomous activity as agencies of self-government or as special-purpose associations, on the other. However, to the extent that they regularly perform state functions, the public organizations must be considered a part of the overall mechanism of the state. It goes almost without saying that this applies in particular to the party, which in the words of Lukianov and Lazarev, represents the "highest form of the public organization" and which is, in fact, next to the state, the only "political organization" in the USSR.[11]

But it is clear that the most important characteristic of the Soviet "socialist state" is the closely interwoven machinery of party and state. It is this machinery which provides the institutional basis for the party dictatorship and which constitutes the essence of Soviet totalitarianism. The party is thus the bearer of the political as well as the juridical authority in the state—a fact so far openly conceded by only a handful of Soviet legal authorities. Soviet constitutional theory does, however, admit that there are normative acts, apart from the written Soviet Constitution, which possess the character of constitutional law.[12]

Furthermore, Soviet legal theoreticians look upon the party Statute (Rules) (except for the provisions that represent purely internal by-laws falling within the province of civil law) as the core of substantive constitutional law of the Soviet state. Similarly, most of the normative acts of the top party organs, the basic provisions of the CPSU Program affecting the relationship of party organs, the soviets and the mass organizations, as well as established party usage, must be considered as elements of party law of a constitutional nature.[13] In this respect, however, a sharp distinction must be drawn between CPSU "rules governing internal party affairs," and party "directives" which govern the activity of all public and state organizations.[14]

State Functions of the CPSU

Soviet constitutional law theory distinguishes between the formal and the substantive functions of the state. A legal analysis of the relationship between party and state must proceed

On the Role of the Party

The evolution of the dictatorship of the proletariat into a state of the entire people and the transformation of the guiding force of Soviet society, the Communist Party of the Soviet Union, into a party of the entire people presuppose an improvement in the forms and methods of party guidance. The party is the advance force of the Soviet people. It is natural that the Soviet people regard the intensification of the influence of the party and its ideology on the life of society as the earnest of successes in Communist construction, in raising living standards and in the development of democracy. . . .

The intensification of the guiding role of the Communist Party is an integral feature of all the life and activity of the state of the entire people. It derives from the fact that the party, basing all its activity on Marxist-Leninist theory and on a profound study of the economic, socio-political and ideological processes of social life, is the most consistent champion of scientific principles in the guidance of society. The essence of the Leninist style of party guidance lies in the fact that this guidance is not administrative but of the supreme, political type. The party exercises *political guidance* over all state and public organizations. But it does not assume their functions, the functions of direct management. The party has a profound interest in the full-blooded functioning of all links in the mechanism of the state of the entire people; it gives them a correct direction and mobilizes and organizes the efforts of society for the solution of the tasks of Communist construction.

—*Pravda*, Dec. 6, 1964.

[11] *Ibid.*, p. 60. Elsewhere (*ibid.*, p. 68), Lukianov and Lazarev underscore that besides the state only the party would embody the political, economic and ideological leadership.

[12] *Cf.* A. I. Lepeshkin, "k voprosu o poniatii predmeta sovetskovo gosudarstvennovo prava (On Understanding Soviet Constitutional Law)," *Sovetskoe gosudarstvo i pravo*, No. 6 (1959), pp. 75–87; V. F. Kotok, "O sisteme sovetskovo gosudarstvennovo prava" (The System of Soviet Constitutional Law), *loc. cit.*, pp. 62-74.

[13] *Cf.* A. I. Lepeshkin, *Kurs sovetskovo gosudarstvennovo prava* (Course in Soviet Constitutional Law), Moscow, 1961, Vol. I, pp. 82-88.

[14] Lukianov and Lazarev, *op. cit.*, p. 73.

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from the legal functions of the Soviet state, since the extent of the substantive functions, as post-Stalin developments have shown, can be varied at will by those in power.

In outlining the formal functions of the state, Soviet constitutional lawyers ordinarily start with the government organs enumerated in the Constitution. Unfortunately, such a method cannot avoid arbitrary listings that are of little analytical value. For example, some Soviet writers include among the basic organs of the state the Soviet Army and the State Security forces, both of which are unquestionably elements of the executive branch.

Clearly, a useful functional articulation of the governmental structure of the USSR must proceed from an analysis of the generally accepted functions of the Soviet state. Once the various legal functions have been defined, it becomes possible to identify the organizational component discharging each particular function. The functional trinity, for example, that obtains in a state based on the rule of law and committed to the separation of powers—legislative, executive, and judicial—is matched by the corresponding three coordinate branches of government.

The Soviet state, on the other hand, is constructed on the principle of fusion of powers, and the distinction between formal state functions is justified in the main by the need for division of labor in the government. Soviet constitutional reality, as reflected in substantive constitutional law, reveals two new state functions—planning and control—in addition to the traditional three (legislative, executive [government and administration] and judicial). Owing to the totalitarian character of the Soviet state, the former two have developed into specific powers of government, discharged by special planning and control organs. The five functions together will form the basis for our analysis of the legal relationship between party and state in the USSR.

The role played by the CPSU in the exercise of these functions is strongest in the spheres of planning, the executive and control. Frequently, the party also has a direct hand in the legislative process. (Important legislation is prepared as a rule by the party and then formally enacted by the appropriate state organs, *i.e.*, the Supreme Soviet and its Presidium. Sometimes, however, the party appears directly in the role of the legislator. This occurs primarily when "joint decrees" are issued by the CPSU Central Committee and the USSR Council of Ministers. Occasionally, the party assumes exclusive legislative authority, as happened, for example, when in January 1959 the 21st CPSU Congress adopted—without concurrent approval by the Supreme Soviet—the Seven-Year and Twenty-Year Plans, which thereupon took legal effect. In the judicial branch, the party's influence is indirect, but here, too, its activity is extensive.

The party's role in the performance of state functions in the USSR has been described as follows by the organ of the Law Institute of the Soviet Academy of Sciences:

> *The Communist Party is the only party in our country. It is at one and the same time the governing party and the absolutely dominant party. . . . [it] coordinates the work of the organs of governments, of the courts and administrative bodies, guides their activities, occupies by virtue of its great authority and unusual wealth of practical experience the positions in all state and public organizations and puts into effect sternly and unwaveringly its general policy line.*[15]

Not surprisingly, primary reference in this passage is to the executive functions of the state. The executive branch, it should be noted, exercises the powers of government on the one hand, and strictly administrative functions on the other. In the administrative sector, party authority is particularly noticeable at the higher levels; at the lower echelons, now that Khrushchev's reform of the party structure has been rescinded, a clear separation between state and party authority is again in evidence.

The governmental powers, in turn, involve the functions of policy determination and organization, which are closely connected. Significantly, Article 68 of the Constitution, which deals with the functions of the USSR Council of Ministers, *i.e.* the *de jure* Soviet government, does not even mention basic policy formulation. This function, as is well known, is delegated to the CPSU Congress, which pursuant to Article 33(c) of the party Rules sets the general line in matters of domestic and foreign policy and examines and decides on the most important questions of "Communist construction." The general line is defined in more detail, and sometimes also amended, by resolutions or orders of the CPSU Central Committee. Governmental decisions and concrete directives implementing the general party line emanate from the execu-

[15] "Pod rukovodstvom Kommunisticheskoi partii za dalneisheie ukreplenie sovetskovo sotsialisticheskovo gosudarstva (Under the Leadership of the Communist Party for the Further Consolidation of the Socialist Soviet State)," *Sovetskoe gosudarstvo i pravo*, No. 8 (1957), p. 6.

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tive agencies of the Central Committee, *i.e.* the Presidium and the Secretariat. In the performance of these functions the full members of the Presidium (formerly known as Politburo) and the First Secretary play a principal part. That the Presidium is the *de facto* government of the Soviet Union was made clear by Lenin as early as 1920, at the 9th Party Congress:

A vast amount of the work of the Political Bureau during this year consisted in passing decision on all outstanding questions of policy, in coordinating the activities of all the Soviet and party organs, and in bringing into common action and directing the work of the entire Soviet Republic. The Political Bureau decided all questions of foreign and domestic policy. . . .[16]

The directives of the executive organs of the CPSU Central Committee are legally—not only politically—binding on the executive organs of the state, *i.e.*, on the Presidium of the Supreme Soviet of the USSR and on the USSR Council of Ministers. Soviet constitutional theorists base this binding obligation on the Leninist principle of strict subordination of the state apparatus to party guidance. Lukianov and Lazarev write:

That the machinery of the state is subordinate to the policies of the party is manifested first of all by the circumstance that no state organ can deal with an important political or organizational question without guiding directive from the Communist Party.[17]

Similarly Yampolskaia:

The Council of Ministers of the USSR performs all of its activities under the direct control of the Central Committee of the Communist Party of the Soviet Union.[18]

The organizational function connected with the power of government extends partly to the institutional sector, *i.e.*, the bureacratic structure of the state, and partly to the personnel sector. Only the top party organs have unrestricted powers of organization; the chief executive organs of the state have merely residual powers in this sphere. By the same token, the party leadership also has the right to draw the limits of authority between the state in the narrower sense and the public organizations. Lukianov and Lazarev state in this connection:

In keeping with the concrete historical conditions, the party regulates the spheres of activity of the state and the public organizations; it thus determines the methods by which the tasks of Communist construction before the country are to be fulfilled. . . . [and] also enables these bodies to exercise more effectively their role of leadership.[19]

Within the institutional sector, the power of organization is effected in two ways: (1) By issuing rules of organization which, in contrast to rules of conduct, are frequently laid down solely by the party, but which are binding on those organs of the state that fall under their sweep; and (2) by promulgating service regulations directly affecting the organizational structure of state agencies. Within the personnel sector, the power of organization is also exercised in a double fashion: (1) Through the monopoly the party has on nominating candidates for elective bodies; and (2) through the party-controlled, Union-wide personnel selection system based on the *nomenklatura*.[20]

In short, even a cursory analysis reveals that the CPSU exercises the function of government in the USSR and that it must therefore be recognized as the true source of political power in the Soviet state. It governs that state and determines its nature.

The Fountainhead of Sovereignty

The high degree of participation in the legal functions of the Soviet state makes the party predominate over all other public and state institutions in the USSR. The scope of CPSU functions also shows that party and state, while not identical, are nevertheless closely integrated. This connection has a legal bearing in two respects. In the first place, since the party directly participates in all the important state functions, it becomes an integral part of the state in the wider sense; similarly, party organs

[16] V. I. Lenin, *Ausgewählte Werke* [Selected Works], East Berlin, 1953, Vol. II, p. 648.
[17] Lukianov and Lazarev, *op. cit.*, p. 243.
[18] Yampolskaia, *op. cit.*, p. 169.
[19] Lukianov and Lazarev, *op. cit.*, pp. 253 and 263.
[20] The *nomenklatura* is a roster of names and positions kept by party organizations, from local district committees on up to the Central Committee of the CPSU; this mammoth patronage system is used to fill every job of importance in the USSR. For details, see Jerry F. Hough, "The Technical Elite vs. the Party," *Problems of Communism*, September-October 1959, p. 56.

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become organs of the state broadly defined.[21] Secondly, the state (in the narrow sense) is assigned an autonomous sphere of competence of its own. (One could thus speak of an incomplete separation of powers in the USSR, resulting from the dual structure of the Soviet state.) It acts in pursuance of strictly-defined party directives only when it performs high functions of state in the wider sense.

Such directives may be defined as orders issued to organs of the state (in the narrow sense), which bear legal consequences and are regularly obeyed in accordance with the unrestricted control of the party over the enforcement powers of the state. The contention of Soviet writers on constitutional law that party directives are unsupported by state sanction and should therefore be considered social norms of a high order, but not legal norms, is thus not correct.[22] Any directive issued by a party organ in its competence to discharge state functions is a legal and not merely a political act. (It is different with recommendations, which must be clearly distinguished from directives.) The party and the soviets, then, jointly exercise the supreme powers of the state, with the party clearly having the largest share of the powers of decision. There is no polar tension between party and state (in the narrow sense), since their relations are governed by the absolute claim to leadership and the unrestricted power monopoly of the CPSU.

It is important, however, to distinguish between supreme state power and its distribution on the one hand, and sovereignty—*i.e.*, the fountainhead of political legitimacy—and its locus, on the other. There is no question but that the real bearer of sovereignty is to be found within the more circumscribed domain of the party, rather than within the larger sphere of the soviets, for it is the party which, according to the unanimous opinion of Soviet constitutional lawyers, expresses the will of the ruling class in the "dictatorship of the proletariat" and, presumably, the will of the entire nation in the "all-people's state."

In fact, of course, as we have already seen, the Bolshevik one-party state is a dictatorship of a minority, exercised by the top party leadership on the basis of the totalitarian organizational principles of the CPSU. The party Statute (Rules), which as fundamental law supervenes the formal state Constitution, merely enables us to locate in legal terms the bearer of supreme authority—and thus of sovereignty—in the state. To identify the locus of sovereignty more precisely, however, requires a detailed analysis of the party power structure, which cannot be accomplished with legal methods alone. Such an analysis shows that the Bolshevik one-party state is an autocracy of the totalitarian type, headed either by a "collective leadership" or by a single leader, depending whether an oligocratic or a monocratic element is in control.[23] Under Khrushchev, the regime was based on an interplay of both elements. The present leadership in the Kremlin bears for the moment an entirely oligarchical character, but this condition is unlikely to last long since the propensity for one-man rule is inherent in any totalitarian system of government. A transition from a totalitarian to an authoritarian system, which would only be possible by restricting the autocracy of the party, would substantially enhance the importance of the state (narrowly defined), without, however, changing in any fundamental way the legal status of the party.

Finally, the CPSU is not only the fountainhead of sovereignty in the Soviet state; it is also a political organization aiming to establish a "classless society" throughout the world. It thus possesses two personalities: as the state party of the Soviet Union, and as the most powerful leader of the world Communist movement. The party-dominated Soviet state is thus a world power which not only claims the leadership of the established Communist governments, but which also strives to supplant the existing international order with a worldwide system of Communist states.

[21] Kamenev and Zinoviev, who after Lenin's death were temporarily associated with Stalin in a triumvirate, openly admitted this: "The party is the organ of the government"; "The party Central Committee is really not the Central Committee for the party but also for the soviets." Quoted from Timaschew, *Grundzüge des sowjetischen Staatsrechts* (Fundamentals of Soviet Constitutional Law), Mannheim, 1925, pp. 32-33.

[22] *Cf.* A. A. Askerov, *Sovetskoe gosudarsvennoe pravo* (Soviet Constitutional Law), Moscow, 1948, p. 286; Ts. Yampolskaia, "Rechtsnorm und Rechtsverhaltnis" (Legal Norm and Legal Relationship), *Sowjetische Beitrage zur Staats- und Rechtstheorie* (Soviet Contributions to the Theory of State and Law), East Berlin, 1953, p. 369; Lukianov and Lazarev, *op. cit.*, p. 74.

[23] *Cf.* B. Meissner, "Wandlungen im Herrschaftssystem und Verfassungsrecht der Sowjetunion" (Changes in the Government and Constitutional Law of the Soviet Union), *Das Parlament* (Bonn), Supplement *Aus Politik und Zeitgeschichte* (Politics and Contemporary History), Oct. 21, 1964, pp. 4-7, 21-22.

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The New Codes of Civil Law

By Klaus Westen

The writing of a new civil code for the USSR has been a significant component of the recent Soviet effort to "recodify Soviet law." In the sphere of civil law, the task was substantially completed last year when new civil codes were adopted in most of the union republics. This accomplishment represents an important step toward consolidating the Soviet legal system, of which the civil law segment has always been the most unstable area; historically, the theoretical and practical importance of Soviet civil law has invariably fluctuated with the current tendencies in Soviet legal policy—from a revolutionary radicalism on the one hand to tentative efforts to assimilate past institutions on the other. In the post-Stalin reform of Soviet law, the year 1964 then marks a climactic point. The final stage, however, still awaits the completion of several important projects, such as the recodification of the law of domestic relations, of the land law, the labor law, and the industrial enterprises law.

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Evolution of Soviet Civil Law

The evolution of Soviet civil law [1] has been marked by the same turbulence that has characterized the general political and economic development of the Soviet state. The continuous pendular fluctuations in the status of civil law have ranged from almost total negation of this branch of the law to its full recognition as a

[1] *Cf.* V. Gsovski, *Soviet Civil Law*, Ann Arbor, Univ. of Michigan Law School, Vol. I, 1948; R. Maurach, in *Jahrbuch für Ostrecht*, Herrenalb, No. 2, 1960, pp. 107-128; K. Westen, *ibid.*, No. 2, 1963, pp. 23-45.

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principal segment of the Soviet legal system. The most serious threat to the position of civil law came just after the Revolution, during the period of War Communism. The early Marxist-Leninists generally held civil law in low esteem, viewing it as the archetype of bourgeois class-law designed to protect the capitalist system of property and commerce.

In this period, moreover, civil law was deprived of much of its function by the hasty attempts to socialize and regiment the economy.[2] The general expropriation of real property, mineral and water resources, and farms[3] stripped private property law of most of its relevance, and the abolition of the right of inheritance (April 27, 1918) destroyed the main basis of private property creation. Finally, in 1918, Soviet lawmakers recast the law of domestic relations and the labor law, removing both from the remaining corpus of civil law. Whatever facets of civil law survived these legislative acts served little purpose in a period dominated by anarchy and the struggle for bare survival.

A major change affecting the civil law was brought about by the New Economic Policy (1922 to about 1929), which enlisted private initiative in an effort to repair the damage inflicted upon the economy by Bolshevik revolutionary ardor. Since clear and comprehensive rules of law were required for this task, the NEP period brought the first codification of certain important branches of Soviet law, especially the civil law. In the Soviet view, the objective of civil legislation at that time was "to keep in check the capitalistic elements which are allowed to operate in the restoration of the economy, to limit their participation to an area sharply defined by the state, and to maximize the development of the socialist sector."[4]

This dual outlook of the NEP planners found its reflection in the RSFSR Civil Code of October 21, 1922, as well as in the corresponding civil law codes of the other union republics. In both structure and doctrine, the RSFSR code was strongly reminiscent of the traditional European civil codes, but it also exhibited certain characteristics of "socialist" law, especially in its deference to the interests of the state and in its assignment of various activities to continuing exclusive state control. Nevertheless, the right of private inheritance was restored again, although with certain restrictions (laws of May 22, 1922, and February 15, 1926).

The official legal theory of that period, propounded by E. Pashukanis, was in keeping with the predominantly private-law character of the current Soviet civil law. It viewed law, especially civil law, as a capitalist category which could not survive with a socialist content and was bound eventually to wither away. Pending this outcome, however, the socialist state had to make use of "bourgeois" law. With respect to civil law, Pashukanis propounded the concept of a "two-sector law": *i.e.*, an economic law applicable to legal relationships in the socialized sector and a civil (private) law applicable in the private sector.[5]

The historical period following the NEP—the period of the Stalinist "reconstruction of the economy on the basis of socialism"—was intrinsically hostile to law.[6] The radical transformations of the existing economic and social systems ignored all legal norms, and even though the Civil Code of 1922 remained technically in force, it was stripped of wide areas of application.[7] Legal transactions within the socialized economy turned into administrative processes controlled by public law, leaving for the application of civil law only the severely circumscribed sphere of private legal relations. Yet, within these modest limits, civil law regained a certain stability—a development marked, for instance, by the new guarantees of the right to own personal property as well as to pass it on to heirs, included in the 1936 USSR Constitution.

The new official legal theory of the period, developed mainly by Andrei Vyshinski, set forth the doctrine of a separate body of "socialist Soviet law." Accordingly, Soviet civil law ceased to be considered a withering branch of "bourgeois" law and came to be regarded as a constituent part of "socialist" law; it was now to govern legal relationships and transactions in both the socialist and private sectors, as well as relations between private individuals

[2] *Cf.* V. Gsovski and K. Grzybowski, *Government, Law and Courts in the Soviet Union and Eastern Europe*, London, Stevens & Sons, 1959, Vol. II, p. 1112.

[3] Regarding the various acts of expropriation during the years 1917-1920, see Gsovski, *op. cit.*, p. 10 ff.

[4] A. S. Fedoseev, *Tvorcheskaia rol sovetskovo gosudarstva i prava v postroenii sotsialisticheskovo i kommunisticheskovo obshchestva* (The creative role of the Soviet state and law in the construction of the socialist and the Communist society), Moscow, 1951, cited from the German edition, Berlin, 1954, p. 140.

[5] E. Pashukanis, *Allgemeine Rechtslehre und Marxismus*, Wien-Berlin, 1928.

[6] *Cf.* K. Westen, *Die rechtstheoretischen und rechtspolitischen Ansichten Josef Stalins*, Lindau and Konstanz, 1959, p. 48 ff.

[7] *Cf.* Gsovski, *op. cit.*, p. 1126.

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and public organizations. In Vyshinski's words, Soviet civil law became

a special expression of the will of the working class and of the entire Soviet people to protect, strengthen and develop the personal and family relationships of the citizens, public offices, enterprises and organizations in harmony with the interests of socialist construction.[8]

Under the circumstances, there was no longer any need for separate bodies of law for the socialist and private sectors.

The civil law codes of 1922-23 hardly met the requirements arising from this new approach, and a recodification of the civil law was in fact planned as early as 1936. Nevertheless, the old codes remained in force, and while many of their provisions had become meaningless, others—owing to the abstract, formal nature of civil-law norms—could readily be applied to new circumstances. When the existing codes no longer satisfied the political and economic requirements of the regime, new legislation was enacted. Thus, in the 1940's, several new enactments strengthened the private sector within the body of civil law. These reflected mainly the policy of concessions to the privileged managerial and technical elite, which had become indispensable to the system. Such new legislation included the abolition of the inheritance tax (1943); recognition of the principle of substitution in the law of inheritance, with a consequent enlargement of the circle of legal and testamentary heirs (1945); and the permission of private-home building, subject to certain conditions (1948).[9] In terms of the development of jurisprudence, however, the later Stalin era remained a period of sterility.[10]

After Stalin's death, and especially after the 20th CPSU Congress (1956), theoretical discussion of questions of civil law revived rapidly. With it reappeared the old controversy over the definition of the proper subject matter of civil law and the relationship between civil law and economic law.[11] Other topics that gave rise to debate included individual rights[12] and the relationship of the individual to the law,[13] as well as questions relating to personal property, contracts and inheritance.

As far as legislative action is concerned, the first significant post-Stalin development was the 1957 amendment of Article 14(u) of the USSR Constitution, which formally prepared the ground for recodifying the civil law.[14] The amendment reserved for the Union the determination only of the fundamental principles of civil legislation; the authority to write the actual civil codes thus reverted to the union republics, where it had been before 1936.

It was not until December 8, 1961, that the USSR Supreme Soviet followed suit by adopting the "Fundamental Principles of Civil Legislation in the USSR and the Union Republics" (hereafter cited as Principles).[15] This act, which went into effect on May 1, 1962, set down in fact more than mere guidelines to civil legislation, for it contains in elaborate form the most important norms of Soviet civil law. It has served, of course, as the basis of the new civil codes that went into effect in various union republics in 1964.[16]

Structure and Contents of the New Codes

The new Soviet civil law has the task—as stated in the preamble to the Principles and to the various republican civil codes—of actively contributing to the resolution of the problems encountered in the construction of communism. It is designed to strengthen the Soviet economic system and to promote the evolution of the two existing forms of socialist property—state and cooperative—into a single form of Communist property. It is also meant to further planning and contractual discipline, economic accounting, the timely and proper fulfillment of delivery contracts, the continuous increase of productivity, fulfillment of investment plans, effectiveness of capital investments, improvement of state purchasing of farm products, and the development of trade. Although the strongest emphasis is placed on social and economic objectives, the new civil law is also expected to

[8] A. Vyshinksi, *Osnovnye zadachi nauki sovetskovo sotsialisticheskovo prava* (The principal tasks of the science of Soviet socialist law), Moscow, 1938; cited from the German edition in *Sowjetische Beiträge zur Rechts- und Staatstheorie*, Berlin, 1953, p. 91.

[9] This right has been confirmed and at the same time more precisely defined by the new civil law (Art. 25, II, Principles).

[10] Maurach (*op. cit.*, p. 120) calls the period between 1938 and Stalin's death the "silent period" of Soviet jurisprudence.

[11] *Cf.* the detailed treatment by R. Maurach in *Recht in Ost und West*, Berlin, 1959, pp. 1 ff., 217 ff.; also A. Bilinsky, in *Osteuropa-Recht* (Stuttgart), No. 3, 1961.

[12] *Cf.* especially articles by A. A. Piontkovski, in *Sovetskoe gosudarstvo i pravo* (henceforth cited as SGIP), 1958, No. 5, p. 28, and No. 11, 1962, pp. 15 25.

[13] *Cf.* M. S. Strogovich, in SGIP, No. 6, 1964, p. 51.

[14] Law of Feb. 11, 1957.

[15] *Vedomosti Verkhovnovo Soveta SSR*, 1961, No. 50.

[16] Text in *Sovetskaia yustitsiia*, No. 13-14, 1964, pp. 4-57.

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safeguard the material and cultural interests of citizens, to coordinate their interests with the interests of society, and to stimulate creative initiative in science, technology, art and literature.

This long catalogue of functions is matched by the scope of the subjects to which the Soviet civil codes apply. Unlike West European codes of civil law, the Soviet codes embrace such subjects as insurance law, copyright law, patent law, and the core of private international law—all of which are separately treated in traditional Continental legal systems. In other respects, however, the Soviet civil law codes are more restrictive than their Western counterparts, for they do not include the law of domestic relations and land law, which in the USSR are dealt with separately.

In terms of organization, the new Soviet civil codes follow the Continental European pattern of subdivision. They are divided into eight parts: a general part; the law of property (following the pandectal system); the law of contracts (again, following European tradition, subdivided into a general and a special part); copyright law; two parts dealing with the rights of discoverers and inventors; the law of inheritance; and private international law.

In contrast to the usual pattern of Western civil codes, which have come through long tradition to be accepted as the kernel of the Western legal systems and consequently have no need to include a statement of their scope and purpose, Soviet civil law attempts a definition of its own subject matter. The general section of the new codes states (Principles, Art. 1, I) that Soviet civil law regulates not only property relationships and related non-property personal relationships, but also such other non-property personal relationships as are specified by law. This declaration is actually a compromise formula which goes beyond the earlier radical Marxist conception of civil law as merely property law, yet does not go so far as to leave the regulation of non-property personal legal relationships as a whole (including family law, for instance) to the civil code.

Within the areas defined above, the norms of Soviet civil law are applied on three levels: on the first level, to the legal relationships of state, cooperative and social organizations to one another; on the second level, to the legal relationships between state, cooperative and social organizations on the one hand and citizens on the other; and, on the third level, to legal relationships between individual citizens (Principles, Art. 2; Civil Code of the RSFSR, Art. 2).

The inclusion of legal relationships within the "socialist sector" in the sphere of applicability of the norms of civil law is no doubt the most significant doctrinal aspect of the new Soviet civil law legislation. It signifies the rejection by Soviet lawmakers of the hitherto apparent trend in Soviet jurisprudence towards a separation of civil and economic law. That trend received considerable impetus in the years immediately following Stalin's death and seemed likely to prevail in the recodification of the civil law. On the contrary, however, the lawmakers decided that legal relationships among socialist enterprises and organizations should remain within the province of civil law. This has greatly enhanced the position of civil law within the Soviet legal structure; yet what the Soviets understand as "civil law" (*grazhdanskoe pravo*) coincides now only in minor part with civil law in the established sense. In differentiating civil law from other branches of the law (such as administrative, economic-administrative, and planning law), Soviet jurists rely on the criterion of the parity of the partners. That is to say, relationships between partners on an equal legal footing fall within the purview of civil law, while relationships in which one of the partners stands on a higher level of authority than the other come within the province of administrative law, and so on.[17]

A striking departure from the traditional civil-law character of the general section of the new codes is the attempt to enumerate and define the sets of conditions giving rise to various legal relationships (Principles, Art. 4; Civil Code of the RSFSR, Art. 4). Though certainly commendable from the standpoint of clarity, this also is a compromise. For while, on the one hand, the attempt aims at defining the frame within which a juridical person can act, on the other it concedes the principle of freedom of contract within certain limits. And once it is recognized that civil rights and duties arise not only from juristic acts specified by law but also from other juristic acts insofar as they do not violate the law, this signifies the abandonment in principle of the rigid dogma of the 1930's which viewed the law as

[17] *Cf., e.g.*, D. M. Genkin, in SGIP, No. 9, 1956, p. 35 ff. Regarding the resemblance between this delimitation and the distinction between private and public law in continental European law, see S. Braga, *Jahrbuch für Ostrecht*, No. 2, 1960, pp. 69-84.

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a complete catalogue of permissible legal relationships.

Admittedly, the motive for such a "liberalization" is to be sought primarily in the interest of the regime in achieving a more effective functioning of the economy. Past Soviet experience has taught that excessively rigid legal regulations inevitably hamper the operation of highly complex economic processes. Accordingly, the objective of recent Soviet legal policy has been to impart greater flexibility to the judicial apparatus in dealing with individual economic situations.

As to the legal position of the individual person, Soviet civil law now fixes his legal capacity in traditional formal terms (Principles, Art. 8; Civil Code of the RSFSR, Art. 9, II). This capacity begins with birth, ends with death, and is equally inherent in all citizens, whereas the old law (Civil Code of the RSFSR, 1922, Art. 4, I) enabled the state to confer legal capacity on the individual in the sphere of civil law as a means of developing the forces of production.

Juristic persons (state and cooperative enterprises and organizations) also possess legal capacity within the sphere of their assigned tasks (Principles, Art. 12; Civil Code of the RSFSR, Art. 23). At the same time, this capacity is subject to a basic limitation deriving

Civil Law & the Public: Some Problems

The participation of the public in the hearing of civil cases enables the courts to study the circumstances of specific cases more profoundly, to discover the reasons for disputes and frequently to achieve their peaceful resolution, and also serves as a warning to lawbreakers and helps to eliminate the causes and conditions that engender lawbreaking.

The courts' enlistment of representatives of the public in the hearing of civil cases also has great importance for the mobilization of workers, employees and collective farmers for the struggle against private-property, religious and other survivals in the consciousness of the people, against violations of labor discipline, the rules of socialist society and the norms of Soviet morality, and against shortcomings and lapses in the work of individual enterprises, institutions . . . and officials. . . .

When a judge deems it expedient that a representative of the public participate in the hearing of this or that civil dispute and so informs the public organization or working people's collective, he should make clear what the function of the representative of the public is at the trial, as well as the procedure for selecting a representative of the public and establishing his authority.

Yet there have been instances in which the judges do not explain the above-mentioned questions but only propose the selection of a representative of the public to appear in court.

Such a practice is incorrect; it leads to the designation of representatives of the public by the personal decision of the leaders of the public organization or working people's collective.

In these cases, the persons who have been empowered to appear as expressers of the opinion of the collective are actually not such. They cannot perform the task they are charged with, *i.e.*, informing the court of the public's attitude toward the dispute under scrutiny.

The naming of representatives of the public by personal decision of the leaders of enterprises, institutions and organizations and the chairmen of factory or local trade union committees, street committees, women's councils and so on, without a discussion in the collective of the parties' behavior, has the result that at the trial such a representative either expresses his own personal opinion on the disputed questions or reduces his statement merely to a request that the suit be granted or denied.

Those courts act incorrectly, therefore, that permit representatives of the public to participate in the hearing of a case on the basis merely of warrants from the leaders of institutions or public organizations, without demanding and obtaining extracts from the resolution of the full assembly or elective agency of the public organization or working people's collective.

—From Builleten Verkhovnovo Suda RSFSR *(Bulletin of the Supreme Court of the Russian Republic), No. 1, 1965, pp. 3-7.*

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from the statutory allocation of their tasks, which lets such organizations act as a rule in the name of the Union or of a union republic. State enterprises, as juristic persons, are further restricted in their legal capacity in that they do not own but merely have operative control over the property at their disposal, for which they are nevertheless directly responsible, just as juristic persons in Western legal systems are directly responsible for their owned property.

A new feature of Soviet civil law is the grant of personal legal protection (Principles, Art. 7; Civil Code of the RSFSR, Art. 7) against libelous and degrading assertions not falling within the purview of criminal law. In conjunction with the rules governing claims under the law of torts, the new Soviet civil law thus recognizes a so-called "general right of the person," [18] although it does not explicitly accord protection of privacy and protection against indiscretions.

The law of property is at once the core and the most distinctive feature of a socialist system of civil law. Unlike Western private-law systems, which usually proceed from a uniform concept of property, Soviet civil law differentiates between several forms of property: *i.e.*, state property; cooperative-collective property; property of trade unions and social organizations (a new form of "socialist" property); and, finally, personal property,[19] considered to be a special form of property derived from socialist property and altogether different from private property in the Western legal sense.

To the outside observer, it is not self-evident that all these forms of property should be—as they have long been in the USSR— the objects of civil law, particularly since "socialist" property, where it is not in the form of consumer goods, is largely removed from the sphere of regular commercial transactions and may or may not be mortgaged or taken in execution to satisfy the claims of creditors. Only personal property as defined by Soviet law can be the subject of obligations characteristic of private civil law.

From the practical standpoint, the law of contract is unquestionably the most important part of the new Soviet civil law. It is a striking fact that no less than 317 of the total 569-odd articles making up the Civil Code of the RSFSR are concerned with this subject. In fact, the law of contract is basic to the regulation of all transactions not only for the entire socialist sector but also for the private sector.

The definition of contractual obligations (Principles, Art. 33, I; Civil Code of the RSFSR, Art. 158, I) follows almost verbatim the language of the German Civil Code (Sec. 241), just as the doctrine of contract as a whole follows the Continental European (*i.e.*, Roman-law) tradition. However, the socialist character of Soviet civil law strongly reasserts itself in the specifications of the sources of such obligations, for here administrative acts connected with the state economic plan (Principles, Art. 33, II, in conjunction with Art. 4) emerge, along with contracts, as the most important source. However, to the extent that such acts often merely create the duty to enter into a contract which then establishes the actual obligations, they cannot be regarded, in a strictly formal sense, as the direct source of these obligations.

The dual character of Soviet civil law also manifests itself in the provisions of Art. 34, III, of the Principles (Art. 165, II, of the Civil Code of the RSFSR), under which disagreements over the terms of contracts in process of negotiation between state, cooperative or social organizations (except collective farms) for the purpose of fulfilling a plan assignment binding on both parties are to be resolved by courts of arbitration. This requirement is designed to forestall as far as possible any later breaches of contract affecting plan fulfillment.

Another by-product of the Soviet system of planned economy is the stipulation that the payment of a fine or damages for a breach of contract does not relieve the delinquent party from performance of his contractual obligations, except in cases where the plan assignment on which the contract is based has become invalid (Principles, Art. 36, V). Otherwise, Soviet contract law upholds the principle of contributory fault for the adjudication of cases involving irregularities of performance (Principles, Art. 37, I; Civil Code of the RSFSR, Art.222).[20]

The law of contract also includes a section

[18] The influence of Western private law is very marked here. *Cf.*, *e.g.*, the "right of privacy" in American law. In Germany the "general right of the person" has been developed by judicial process since World War II. In France, the operative law has been the general provisions of Arts. 1382 and 1383 of the *Code civil*, while in Switzerland this right has long been established in law (Art. 28 of the civil code, Art. 49 of the commercial code).

[19] This category of property was first recognized and defined in Art. 10 of the Soviet Constitution of 1936; it is now defined in Art. 25, Principles and Arts. 105-115, Civil Code of the RSFSR.

[20] This conforms to the previously existing law. However, Soviet legal theorists contended clear into the 1930's that the Soviet law of compensation was based on the principle of contributory fault (*Cf.* Gsovski, *op. cit.*, p. 1175).

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devoted to the regulation of various special contractual relationships, some of them conforming to traditional Western forms while others are tailored to the requirements of a socialist planned economy. The new RSFSR Civil code covers a total of 22 such special forms of contract, which include those relating to: the purchase by the state and the delivery of the produce of collective and state farms; labor on capital construction projects; rental of residential space; transport; payment of commissions; and credit. A particularly interesting feature is the inclusion of state insurance as a form of contract.

The law of copyrights and patents forms another part of the new civil codes. The inclusion of these matters in civil law is unusual in terms of Western legal custom; and, in fact, the Soviet example is not undeviatingly followed even in the "socialist countries."[21] The Soviet law represents an attempt to achieve a practicable reconciliation of the interests of the creative individual on the one hand and the collective interest of society in the utilization of the products of creative activity on the other; however, in the last analysis, it is the requirements of the socialist planned economy which take precedence. It should be added that the attempt to lay down a statutory law of discovery represents a pioneering effort which seems certain to exert an influence on other—even including non-socialist—legal systems.

The law of inheritance is one of the foundations of every bourgeois system of law inasmuch as it plays an important role in creating (private) property and hence in determining the range of legal transactions. For this reason it has long been a focal point of attention in Marxist theory; and in accordance with one of the demands of the Communist Manifesto, the right of inheritance was totally abolished in Russia immediately after the 1917 Revolution. Since then, however, there has been a gradual restoration of this right, and the new civil code, by abolishing the remaining restrictions on testamentary freedom (Principles, Art. 119, I), has finally brought the law fully back to its "bourgeois" point of origin. Soviet citizens are once more able not only to hand down all of their personal possessions to their legal heirs, but also to bequeath them freely by testament to persons other than their legal heirs, provided however that the legal heirs shall be entitled to two-thirds of the total property bequeathed.

A surprising feature of Soviet civil law, especially given the broad scope of its application, is the relatively small size of the codes. The Civil Code of the RSFSR, *e.g.*, comprises only 569 articles. This raises the question whether it will not become necessary either to adopt special legislation in numerous areas or, in effect, to wait for judicial interpretation to impart full substance to the meager codes. Whether the latter approach would be practicable is hard to say. The idea of developing law through the judicial process is even less familiar to Soviet legal tradition than it is to that of Continental Europe; however, West European judges can rely for guidance on highly elaborate codifications of the civil law, as well as on a long heritage of judicial decisions, neither of which is as yet available in Soviet law. It is doubtful that this lack can be fully compensated for by the power conferred upon the republican supreme courts to issue standards of legal interpretation for the benefit of lower courts.

Notwithstanding this special problem, Soviet law—and Soviet civil law particularly—remains a part of the legal tradition of Continental Europe. It is codified law, and for all the political and economic differences between the USSR and Western Europe, it retains strong similarities, in organization, doctrine and even terminology, with West European civil codes.

Yet, these similarities should not be allowed to conceal the important differences of function and relative juridical import between Soviet civil law and its West European counterparts. While it is the purpose of Western civil law to provide the individual with an orderly legal framework within which he can conduct his own affairs, with as little hindrance as possible, it is the primary objective of Soviet civil law to realize the ideological goals of the Communist social system. Soviet law consequently protects individual rights only to the extent that that their exercise does not run counter to their social function (see Principles, Art. 5; and Civil Code of the RSFSR, 1964, Art. 5).[22]

More concretely, Western law aims at an equitable reconciliation, based on objective justice, between the interests of individuals in re-

[21] See, *e.g.*, the Civil Code of the Czechoslovak Socialist Republic of April 1, 1964.

[22] *Cf. Sovetskoe grazhdanskoe pravo*, D. M. Genkin, ed., Moscow, 1950, Vol. I, p. 116 ff.

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lation to each other and in relation to the community; Soviet civil law substitutes the criterion of party goals for the criterion of objective justice, and the principle of unity of interests (especially between individuals and society) for the principle of reconciliation of divergent interests. Furthermore, this posited identity of individual and social interests in Soviet law generally reduces to a mere formality the principle of equality between the parties to a dispute. Although Soviet jurisprudence, in the tradition of Western legality, does formally acknowledge this principle, in practice it is honored mainly in the breach, for in any contest between private and public interests, the privileged "socialist sector" is invariably favored. Soviet law, for example, does not recognize *bona fide* acquisition of socialist property (Principles, Art. 28, IV), and the statute of limitations does not apply to claims arising from the public sector (Civil Code of the RSFSR, 1922, Art. 60, II; Principles, Art. 17).

Since it is so heavily oriented toward regulating legal relationships in the socialist sector of the economy, Soviet civil law is, in effect, a "two-sector" law despite the contrary intention of the Kremlin legislators. While it asserts the "public interest" even within the area left to private legal transactions with an insistence unknown in the West, it is still the private sector of the Soviet law, rather than the socialist sector, that bears a closer relation to Western legal systems. As it applies to the socialist sphere, in fact, Soviet civil law is reduced to a mere regulatory mechanism of public-law characteristics; in this aspect it leaves virtually no room for private autonomy and freedom of contract. In short, unlike in Western countries (where, admittedly, private-law principles have also been somewhat diluted by public controls, the use of standardized contracts, and special regulation for certain sectors of the economy), civil law in the USSR is viewed from the outset as a mere instrument for the solution of certain economic and socio-political tasks determined by the Soviet party leadership.

It is not surprising, therefore, that despite the Soviet lawmakers' decision to enact a unified civil law and abandon the idea of a seperate code of economic law, the advisability of the latter alternative has not ceased to be debated in the Soviet Union. As a matter of fact, the voices clamoring for such a division have recently grown louder, among the most influential being that of P. S. Romashkin, who has been criticizing the traditional Roman-law approach to the problem and urging the idea of treating economic law as a separate juridical entity.[23] Romashkin's thesis certainly appears logical since it is difficult to see how a traditional system of law can meet the requirements of a complex modern economy, especially one based on socialist planning.

At the same time, the discussion concerning the relationship between civil and economic law has shifted to a different plane. Prior to 1961 what was at stake was a theoretical decision involving a choice between total control and at least partial liberalization. Now, the debate revolves around the functional correctness of legal regulations in the economic sphere and, more particularly, their proper systematization. This does not mean that there would have to be a refashioning of the civil codes if a new division of economic law were to be established; rather, the present civil codes, together with certain special branches of law (notably economic-administrative law) would be the foundations of the new economic law.

Whether judged by Marxist or by non-Marxist Western standards, the new Soviet civil law remains definitely conservative in character. The basic problem presenting itself in this area stems from the fact that the inclusion in the civil law of the juridical relationships of the socialist economy tends to dilute its specific civil-law character and to reduce the legal relationships between citizens to nothing more than a necessary minor appendage to this branch of the law. On the other hand, however, the application of civil-law categories to the socialist sector affords at least the possibility of a loosening of the rigidity inherent in a state-directed economy. It is not inconceivable that the civil law, by reason of the central position it has been given in the Soviet legal system and the objective logic inherent in it, might tend in time to place a more liberal stamp on the entire economic and social system.[24]

Perhaps the most positive feature of the new civil law is the fact that for the first time in Soviet history it recognizes the human person as one of the central objects of legal protection. In this sense, it attests that the Marxist-Leninist doctrine that man can attain freedom and self-realization only through collective regimentation, though still a part of the official ideology, no longer has unqualified validity in the practical workings of the Soviet legal system.

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[23] Cf. P. S. Romashkin in *Metodologicheskie problemy nauki*, Moscow, 1964 (Contributions to the session of the presidium of the Academy of Sciences of the USSR of Oct. 18, 1963).

[24] *Cf.* Westen, *op. cit.*, p. 39 ff.

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Personal Property: Downward Trends

By Samuel Bloembergen

Since the latter part of the 1950's there have been a number of developments in Soviet justice which seem to spell at least a partial reversal of the earlier post-Stalin trend—most evident during 1955-57—towards greater regard for the rights of the citizen and a more scrupulous interpretation of "socialist legality." Foremost among these retrogressive developments have been the introduction of the so-called "anti-parasite" laws, the establishment of "comrades' courts" vested with punitive authority, and especially the decrees of 1961-62 making the death penalty applicable to various categories of "economic crime." The present article addresses itself to still another but less publicized manifestation of the same countertrend in the particular area of personal property rights—namely, the legislation enacted in the USSR in 1962 providing for the confiscation without compensation of privately-owned dwellings acquired by means of "unearned income." First, however, it may be helpful to review briefly the prior course of Soviet legislation regarding private ownership of real property.

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Background

As part of the sweeping socialization program launched soon after its seizure of power, the Bolshevik regime in 1918 decreed the total abolition of private land ownership, nationalized a substantial part of existing privately-owned housing, and imposed severe limitations on the right of individual citizens to own, inherit or bequeath, build or otherwise acquire residential buildings. In 1922, however, following the retreat to the New Economic Policy (NEP), these measures were somewhat moderated by a new decree which recognized the right of citizens to retain ownership of buildings not nationalized by the local soviets, to transfer such buildings together with the lease of appurtenant land, and, with the permission of the local authorities, to construct new dwel-

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lings which would remain their personal property for a fixed period not to exceed 49 years.

Article 10 of the Stalin Constitution of 1936 reaffirmed the right of Soviet citizens to acquire personal ownership of dwelling houses, but in fact this provision remained largely an empty promise throughout the 1930's because of the disruptive effects of the forced collectivization and industrialization programs. Subsequently, the enormous devastation wrought on Soviet soil by World War II sharply reduced the available supply of housing, both public and private, generating pressures which in 1948 finally resulted in a significant liberalization of the laws governing private home ownership.

An edict issued by the Presidium of the USSR Supreme Soviet in August 1948 granted every Soviet citizen the right to buy, or to build for himself, a dwelling of one or two stories and one to five rooms which would be his personal property, and for which he would be allotted the necessary land for use without any time limit.[1] As a further stimulus to private initiative in meeting the housing shortage, the regime also instituted state subsidies for private home construction. One Soviet writer at the time enthusiastically interpreted these measures to signify that henceforth each individual citizen was to be entitled to his or her own home.[2]

By 1960, however, there were indications that the regime had begun to view the expansion of private home ownership as a threat to the "advance toward communism." One of the first signs of a change in policy was the discontinuance of state subsidies for private home-building. Equally significant was a statement published in *Kommunist* (No. 14, 1960) which called personal property "a phenomenon . . . extremely hostile to socialism" and declared that "in the period of full-scale construction of communism" the workers' needs for living space would be adequately met by a steadily expanding supply of housing built with public funds.

In late 1961 there was further evidence of the regime's intent to retighten restrictions on private home ownership. A new set of "Principles of Civil Legislation and Procedure" [3] was drawn up and issued in December 1961 as a central directive to the union republics, which in 1963 began issuing new civil codes based on this directive. The republic codes, besides continuing a regulation adopted in 1958 limiting the size of privately-built houses to 60 square meters of living space,[4] introduced a new proviso applicable to a homeowner who subsequently acquires a second house by inheritance. In such cases, the new law required that the second house be sold within the same year in which it was acquired, further stipulating that the local authorities could themselves offer the house for public sale if the owner refused to comply; in the absence of a buyer, the house would become state property without any compensation to the owner.

Meanwhile, the union republics had already promulgated the 1962 decrees "concerning the confiscation without compensation of dwelling houses, dachas, and other buildings built or acquired by citizens from unearned income." [5] This legislation, as the following examination will show, clearly marked a new stage in the trend towards a constriction of personal property rights in the USSR.

Confiscation Law

The 1962 decrees, according to a statement in their preambles, were adopted in response to a multitude of complaints lodged by state and social organizations calling it a gross injustice that there should be people who acquired private dwellings with unearned income or built them with the use of means of production belonging to state enterprises, cooperative farms, and other social institutions. "In this way," it was charged, "these people enriched themselves at the expense of society in general and of the worker in particular." The decrees provided for the confiscation without compensation of houses acquired in this fashion, and for their transfer to the public housing fund of the district or town soviet, or to a cooperative farm or other social institution.

At first glance this legislation seems reasonable enough. It is readily understandable that the average member of the far-from-affluent Soviet society should feel envious of his neighbor who could afford to buy himself a beautiful bungalow, a Volga automobile, and other luxuries, even when it was known that no inheritance or other extraordinary good fortune had come his way. That such cases became more frequent in recent years can be ascribed in con-

[1] *Vedomosti Verkhovnovo Soveta SSSR*, Moscow, 1948, no. 36.

[2] G. N. Amfiteatrov, as quoted by P. E. Orlovski in "O prave lichnoi sobstvennosti na zhiloi dom" (The right of personal property of a dwelling house), *Sovetskoe gosudarstvo i pravo*, Moscow, 1961, no. 7, p. 59.

[3] For a translation of the document, see *Law in Eastern Europe*, Leiden, 1963, Vol. 7, p. 272.

[4] *Vedomosti Verkhovnovo Soveta SSSR*, Moscow, 1958, no. 16.

[5] See, *e.g.*, *ibid.*, 1962, no. 30.

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siderable part to the fact that with the relaxation of the strict control system that was inherent in the Stalinist regime, the bureaucracy tended to get out of hand and to indulge in speculation, bribe-taking and embezzlement. The 1962 decrees would seem to be a justified effort to curb such practices; however, a closer inspection of their content and the manner in which they have been applied will reveal their serious legal and social implications.

First of all, there is the question of the interpretation given to the concept of "unearned income." As the decrees did not provide a clear-cut definition of this term, it was left to the courts to interpret it as they saw fit. Obviously, any income acquired by theft or embezzlement is considered unearned, and a considerable proportion of the actual cases of confiscation without compensation have involved personal property obtained with income derived from these crimes. There is, however, a wide divergence between Soviet and Western standards of what is legal and what is not, and the criteria of "unearned income" are correspondingly far apart. Why, for instance, is speculation a crime in the Soviet Union while in England it is not? Why is any form of private enterprise, except that of the artisan, forbidden in the Soviet Union, and any income derived from such activities held to be "unearned"?

The answer can be found in Article 4 of the 1936 Constitution and in Article 25 of the December 1961 Principles of Civil Legislation and Procedure. The former proclaims that in Soviet society private ownership of the means of production is abolished; the latter stipulates that "each citizen may privately own his earned income and savings, a dwelling house or part of a house, subsidiary household equipment, articles of domestic utility, and articles of personal use and comfort," but that "property privately owned by citizens may not be used as a source of unearned income." [6] In short, it is against the law to use one's private property as a means of production with the intent to make a profit, since this, according to the Soviet view, would breed capitalism. Only the state is entitled to derive profit from exploitation of the means of production. Thus, the Soviet citizen who hires out his private automobile—which is tantamount to using it as a means of production—infringes upon the state's monopoly and hence acts in violation of the law. The same applies to the citizen who maintains a private kitchen-garden out of proportion to the size of his household and sells the surplus produce from it on the market: the income thus obtained is deemed "unearned."

Fifteen months after the enactment of the 1962 decrees, the USSR Supreme Court issued an "instruction" concerning their application. This directive, which was based upon the practical experience of the courts in enforcing the decrees over that period, defined "unearned income" very extensively to include all income derived by irregular means, *i.e.*, not solely through one's personal labor but by engaging in activities in contravention of the law.

Methods of Enforcement

The investigative procedures that have been employed in enforcing the confiscation-without-compensation decrees provide one more example of the Soviet penchant towards extremism. The eagerness of the investigating bodies to bring to justice those who have acquired houses with unearned income has resulted in a weakening of the due process of law and in increased abuse by the bureaucracy of the rights of the citizen. This becomes evident from an examination of the machinery and methods of enforcement.

In conformity with the decrees, a special Investigation Committee has been set up in each town or district and is subordinate to the Executive Committee of the town or district Soviet. The Investigation Committees have about fifteen members comprising representatives of the Soviet, the public and financial authorities, and cooperative, trade-union and other social organizations. Each individual committee member, in his regular daily work, occupies a position which enables him to keep an eye on the income and behavior of his fellow citizens. Thus, while tips from voluntary informers sometimes set the wheels of investigation in motion, the committee itself also plays an active role, on its own initiative, in tracking down people who have acquired houses with unearned income.

Two different approaches are used by the Investigation Committees. One is to go to the town or district office administering housing affairs and ferret out information concerning who owns what sort of a house. A check of the files will soon bring to light a number of persons who have built or acquired houses while apparently not having adequate income from legal sources to meet the expense involved. A second, more extreme approach has been resorted to in Kazakhstan, Georgia and some other union republics, where the police authorities carried out

[6] See footnote 3.

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blanket investigations of all citizens who owned houses in an attempt to discover those who had built or acquired them by means of unearned income. The latter practice, however, was such a flagrant abuse of bureaucratic power that it drew criticism even from the Soviet *Prokuratura*.[7]

After a committee has completed its preliminary investigation of a case, it submits its findings and conclusions to the Executive Committee of the district or town Soviet concerned, which then has to decide whether there are sufficient grounds for transferring the case, together with all the evidence collected, to the people's court for formal action.

If he is not already aware of it, a person suspected of acquiring a house with unearned income becomes cognizant of the fact that he is under investigation when he receives an order to submit in writing a detailed explanation of the circumstances leading to his purchase or building of the house, including a description of the sources of the income used for that purpose. In addition, the owner is required to submit to the Investigation Committee all legal documents proving his ownership. After these papers are in its hands, the committee requests the municipal office of housing affairs to provide an inventory and valuation of the house, together with a statement of its actual cost at the time the owner built it, or, if he bought it from a previous owner, the price he paid.

Having thus established the sum the owner must have spent, the committee starts investigating the sources of his income and those of other members of his household. Committee representatives visit the offices or factories where the owner and members of his family work, in order to check on the actual net wages received by them (*i.e.*, total wages less such payments as taxes, alimony duties, or fines). They then inquire into the expenses of the owner's household for food, rent, clothing, and other living needs at the time the house was built or purchased. If, on the basis of all this evidence, it appears that the total legal income of the members of the owner's household was not sufficient to enable him to accumulate the amount spent on the house, the committee presumes *ipso facto* that the house must have been acquired with unearned income. Should the owner claim that the money used was in fact legally received, as for instance by inheritance or by the sale of his state bonds, these claims are promptly checked with the notary's office or the bank which handled the matters in question.

[7] A. Kholiavchenko, "Praktika primeneniia ukazov o bezvozmezdnom iziatii domov" (The practical application of the decrees concerning the confiscation without compensation of dwelling houses), *Sovety deputatov trudiashchikhsia*, Moscow, 1963, no. 11, p. 90.

—Daddy, I built a little house!
—Good lad! We'll give it to the vacationers!

—From Krokodil (Moscow), May 10, 1964.

The Law in Practice

The following actual cases of confiscation under the 1962 decrees will serve to illustrate how the enforcement procedures described above operate in practice:

One case involved a man named Sablin, a shop assistant in a Moscow department store. A few years ago Sablin had bought a big two-story dacha with two verandas and an attic. As it was ascertained that his average monthly income was only 70 rubles and that his wife did not work at all, the Investigation Committee looking into the case strongly suspected that the dacha had been bought with unearned income. Ordered to supply the committee with pertinent documentary evidence, Sablin submitted a notarially authenticated sales contract making it appear that the dacha had been bought for 70,000 "old" rubles.[8] The members of the com-

[8] 1 new ruble = 10 old rubles = US$1.10.

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mittee doubted, however, that the house could have been acquired for this price and went to see the former owner. From him they learned that Sablin had actually paid 170,000 "old" rubles, and since the latter could not provide proof of any legal source of income large enough to have enabled him to pay such a price, the dacha was confiscated.

In another case, the defendant was a married woman named Parakhin who in 1956 had bought a small, ramshackle house in Lvov province. Subsequently, she had requested and obtained official permission to have some repair and restoration work done on the house, but instead of adhering to the plans as approved by the authorities, she had proceeded to have the house rebuilt and expanded into a large two-story structure with a living space of 158 square meters, the reconstruction costing 200,000 "old" rubles. Investigation revealed that Mrs. Parakhin herself was not employed, and that her husband, who worked in a restaurant, did not earn more than 50-60 rubles monthly. Mr. Parakhin tried to convince the Investigation Committee that he had bought all the building materials from regular outlets at regular prices, and he presented purported copies of the vouchers as proof. When these documents were examined, however, it was found that the dates filled in on the voucher forms by Mr. Parakhin were much earlier than the actual printing of the forms themselves. As Mr. Parakhin could not provide any satisfactory explanation, the house was confiscated.

The 1962 decrees stipulate that anyone subjected to investigation on suspicion of having acquired a house with unearned income shall be entitled to examine the evidence collected against him and to offer explanations and supporting documents showing that the dwelling was in fact built or purchased with funds from legal sources. The important point, however, is that in these cases—as in Soviet legal practice generally—the burden of proof is placed on the accused, rather than resting on the prosecuting authority as in most Western countries. The Soviet homeowner suspected of contravening the 1962 decrees is already presumed guilty once the Investigation Committee finds that the cost of his home is disproportionate to his legally-acquired income. In effect, the accused is told: "You own a house which you obviously could not afford to pay for with your legal income; therefore, you must have bought it with unearned income. Try and disprove it!" In many instances, the people's courts have perfunctorily ordered confiscation without careful evaluation of the evidence placed before them.

This state of affairs held such serious implications for the role of the courts that the procedures employed in enforcing the 1962 decrees have drawn criticism from some Soviet jurists. Writing last year in the Soviet law journal *Sovetskaia yustitsia*, A. Bonner expressed dissatisfaction with the summary nature of the court proceedings in confiscation cases and urged that there be a more thorough judicial examination of the evidence in each case. He stressed the importance of the court's authority to refer a case back to the Executive Committee of the local Soviet with a request for supplementary investigation where the evidence appeared insufficient, and he took the view that the court should make it clear what specific circumstances needed further elucidation. Especially, he argued, the court must require evidence establishing what, in fact, were the sources of an accused person's unearned income.[9]

Special Aspects

Where an investigation uncovers evidence that a house has been acquired with income from the commission of a criminal offense, *e.g.*, speculation or embezzlement, the evidence is handed over to the public prosecutor, in which case the owner can expect not only the confiscation of his house but also the imposition of a severe criminal penalty. There have apparently been several instances in which houseowners, knowing themselves to be under investigation and fearing that this might lead to their prosecution on criminal charges, sought to forestall this dread possibility by volunteering to donate their houses to the local Soviet. Some of them evidently got away with it, because it has been reported that several local Executive Committees in Lvov province accepted such donations in order to enlarge their communal housing funds and stopped the investigations of the donors.

Another extreme aspect of the 1962 decrees is their unlimited retroactive force. As Bonner points out in his article referred to above, the town or district Executive Committee decides in each specific case whether there are grounds for confiscation of a house "irrespective of the date on which it has been built or purchased." This feature of the law could conceivably have

[9] A. Bonner, "Praktika iziatiia stroenii, vozvedennykh ili priobretennykh grazhdanami na netrudovye dokhody" (The practical application of the confiscation of buildings constructed or acquired by citizens with unearned income), *Sovetskaia yustitsia* (Moscow), No. 7, 1964, p. 7.

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far-reaching consequences since it appears to legalize the confiscation without compensation of a house which is deemed to have been acquired by a former owner by means of unearned income but which is presently in the possession of his legal heirs. Going one step further, might not the law even conceivably be construed to apply, for instance, to a house whose present owner inherited it from his father, who in turn had acquired it before the 1917 Revolution with income which was then entirely legal but which nowadays is considered illegal? Apparently, however, exemption from confiscation is granted in cases where a house, though acquired by a previous owner out of unearned income, has since been purchased by the present owner with income from legal sources and acting in good faith (*i.e.*, without knowing that the prior owner acquired the house illegally). In such cases, the former owner is required by the law to hand over to the state the price he received for the house.

It should be noted further that the confiscation-without-compensation decrees apply not only to dwelling houses but also to any other kind of building acquired in order to satisfy the economic, domestic, cultural or other needs of the owner. Experience has demonstrated, however, that a strict enforcement of the law with respect to every type of building can on occasion prove more embarrassing than profitable to the state.

Thus, for example, the newspaper *Izvestia* of August 20, 1963, reported the curious case of a man named Filimanchuk who was found to have used means belonging to the state in order to build a private burial vault for the use of his family. The vault was clearly subject to confiscation under the law, but its seizure was obviously of no benefit to the state. The earlier-cited article by Bonner proposes the imposition of stiff penalties as an alternative to confiscation in such cases. More specifically, Bonner recommneds that the 1962 decrees be supplemented to provide that in cases where for some reason it is not feasible for the state to confiscate a building erected or acquired by means of unearned income, the owner shall be required to pay the state a sum equivalent to the cost of the building and the building itself shall be pulled down at the owner's expense.

As mentioned previously, the 1962 decrees stipulate that confiscated dwellings shall be turned over to the public housing fund of the local Soviet or to state and certain other organizations. However, the decrees also make provision for the allocation of other living quarters to the owners of confiscated houses. If the owner has no other accommodations at his disposal, the court is directed to order the organization or public fund to which his house is to be handed over to provide him and his family with living quarters, either in the same house or elsewhere. In no case, however, is the ex-owner to be allotted more than 60 square meters of living space.

Still Wider Confiscation?

Since the enactment of the 1962 decrees, there has been a highly significant extension of their scope of application in the largest and most important of the Soviet republics—the RSFSR. Apparently motivated by the idea that it would be inconsistent to confiscate a man's house acquired by means of unearned income and at the same time leave him in possession of a car, boat or other vehicle similarly acquired, an RSFSR decree enacted in September 1963 provided that if, in the course of an investigation establishing that a person had acquired a house with income from illegal sources, that person was found to possess any vehicle or vehicles, the latter should also be confiscated along with the house. Thus, no new procedures were necessary with respect to the vehicles.

This new development raises the question whether Soviet lawmakers may not one day carry the process still another step further and legalize the seizure of privately-owned motor vehicles bought with unearned income, without this action being dependent upon confiscation proceedings with respect to a house. Indeed, there have been some indications pointing in this direction. Although, as noted earlier, certain aspects of the 1962 decrees have been criticized, the Soviet press has published many letters from readers praising that legislation and even suggesting that not only motor vehicles but other expensive "luxury" items, such as television sets, washing-machines and frigidaires, should be confiscated if found to have been acquired with unearned income. In fact, in one reported case, the people's court of the town of Novosybkovk actually ordered the confiscation of a car belonging to a certain Makushnikov on the ground that he had bought it with unearned income, although the decision was later quashed by a higher court as exceeding the provisions of the RSFSR decree of September 1963.

What will be the next step in this downward trend? Naturally it is impossible to answer this question with any exactitude. All one can say is that the confiscation-without-compensation decrees and the way they have been implemented augur ill for what is still to come.

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Bylaws of the Elite: The Party Statute

By Georg Brunner

The Communist Party of the Soviet Union currently counts some eleven and a half million members,[1] or slightly over five percent of the total Soviet population. In relation to the majority of Soviet citizens, this minority enjoys considerable privileges, but at the same time more is expected from it. According to Lenin, Communists represent the highest expression of progressive social conscience; of outstanding ability, they provide guidance in all spheres of public life. On the other hand, Leninist doctrine views the party as a tightly organized and disciplined political entity, and as such demands from its members total obedience and unconditional acceptance of all decisions reached by the top leadership. The rank-and-file member thus finds himself in the dubious position of being expected both to lead and be led—to be a model of virtue for the society at large as well as an instrument of those above him.

The legal status of members of the CPSU is determined in the main by the party rules, the most recent version of which was adopted in 1961. To explain the legal nature of this document in terms of Western jurisprudence is a difficult task. According to Soviet civil law, the CPSU is a juridical person. This is made plain by Article 11 of the All-Union law of 1961, entitled "Foundations of Civil Legislation in the USSR and the Union Republics," which specifies that social organizations with property and a budget of their own are juridical persons whose functioning is determined by their own rules.[2] One might accordingly conclude that the provisions of the party rules fall within the province of civil law. Yet this conclusion is inadequate if only for the reason that Article

[1] *Pravda*, Oct. 27, 1964.

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[2] The appropriate regulations are contained in the Civil Codes of the various Union Republics; *cf., e.g.,* Articles 24 and 25 of the RSFSR Civil Code of 1964. Soviet writers cannot bring themselves, however, to state explicitly that the CPSU is a juridical person. At the most, it is said that individual party organizations are juridical persons (A. V. Mitskevich, *Subiekty sovetskovo prava,* [The Subjects of Soviet Law], Moscow, 1962, p. 127).

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126 of the Constitution of the USSR ascribes to the party, as the leading core of all social and state organizations, juridical importance in the constitutional sphere. What is more, in the Soviet system of government, the party is the organ of supreme power, deriving its authority from sources outside the constitution itself. Party law, then, as embodied in the party Rules, represents constitutional law in a larger sense. In the same sense, the rules determining the relationship between the party and its members are also of a constitutional nature.

The regulations defining the legal status of members are contained in Chapters I, II and X of the party Rules. They are further amplified, however, by various normative acts of the party —such as the Central Committee ruling on membership dues of 1962—and by party usage.

Rules of Admission

Article 1 of the party rules defines the requirements for party membership as follows:

Membership in the CPSU is open to any citizen of the Soviet Union who accepts the Program and the Rules of the party, takes an active part in Communist construction, works in one of the party organizations, carries out all party decisions, and pays membership dues.

The wording of this article goes back to Lenin who placed special emphasis on the criterion of "personal participation in a party organization" hoping that it would serve as a means of enforcing strict party discipline. At the Second Party Congress in 1903 this question provoked a violent argument between the Bolsheviks and the Mensheviks, with the latter, following Martov's lead, proposing merely "personal cooperation" as a sufficient condition. In the vote that followed Lenin lost to Martov; but at the Third Congress, in 1905, the Bolshevik leader succeeded in having his views embodied in the party Rules.

The provisions of Article 1 express only in part the true conditions of admission to party membership; the criteria expressed in this article largely concern the duties of members already in the party fold. The requirement of Soviet citizenship is the only true precondition. (According to Article 4, the applicant must have also reached his 18th year.) Restrictions based on social origin are no longer included, as was still the case in the Rules of 1952 under which only persons of working class origin could be admitted. Until 1939, different admission procedures applied, depending on the applicant's social origin.

Aspirants for party membership must first undergo a one-year probationary period as candidate members—a rule that has been in effect since 1919. Upon the expiration of the one-year term, the applicant's primary party organization passes on his admission to full membership. A formal extension of candidate status is not allowed, but admittance to full membership may be informally postponed if absolutely necessary.[3] Admission to membership can follow only upon proper application; if the application is not filed on time, the primary organization may take this as an indication of a negative attitude toward the party and, after a special procedure in accordance with Article 16, conclude that the candidate no longer qualifies for the party.[4]

An applicant for party membership must, also, submit recommendations from three members who have at least three years of party standing and who have known him in productive and social work for not less than one year. In the case of applicants between 18 and 20 years of age, who must enter the party through the Komsomol (Young Communist League), the recommendation of a county or city YCL committee is equivalent to the recommendation of one party member. The Rules do not state how long a recommendation remains valid, but in practice its effectiveness is assumed to last five to six months.[5] The Communist making a recommendation is responsible to the party for the impartiality of his description of the political, professional and moral qualifications of the person he recommends. Since it is rather difficult to foresee whether or not an applicant will fulfill the not always calculable expectations of the party, and since the member who makes the recommendation may be called to account for whatever failings are found in the candidate, readiness to offer such recommendations is not very great.

Decisions on the admission of members are passed at the general meeting of primary organizations by a simple majority vote. If the primary organization approves an application, the decision must be endorsed by the county or borough party committee. In accordance with a resolution of the CPSU Central Committee of

[3] V. Zasorin and A. Fomenko, "Strogo rukvodstvovatsia ustavom KPSS" (Being Strictly Led by the Rules of the CPSU), *Partiinaia zhizn*, (Moscow), No. 18, 1962, p. 11.

[4] *Ibid.*

[5] V. Gorin and M. Karpov, "Nekotorye voprosy chlenstva v partii" (Some Questions of Party Membership), *Partiinaia zhizn* (Moscow), No. 1, 1962, p. 69.

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January 11, 1962, an auxiliary party commission (*vneshtatnaia partiinaia komissia*) consisting of no more than 15 unpaid activists, may be established by local (county or borough) party committees for the purpose of preparing recommendations of the candidates' suitability.[6] The decision of the primary organization takes effect after the endorsement is granted. If the party committee refuses to endorse the approval of an application, the case reverts to the general meeting of the primary organization and there may be little doubt that this time the membership application will be rejected.

If, on the other hand, a primary organization decides to reject a candidate member's application for full membership, it again must pass its decision to the local party committee for endorsement. The applicant than ceases to be considered a candidate member of the party. This form of termination of party membership does not mean expulsion and is not of a disciplinary character. It is possible, however, for the primary organization to combine the negative disposition of an application for full membership with a disciplinary proceeding, and it may then expel the candidate in accordance with Article 9 of the Rules. This procedure is rarely used.

It should be noted, finally, that the procedure for admission of candidate members (individual admission, submission of recommendations, decision of the primary organization as to admission, and endorsement) is identical with the procedure for admission of party members.

Duties of Party Members

The obligations of party membership form the content of Article 2, but they are also mentioned elsewhere. They may be, in accordance with their nature, divided into four groups.

(1) The duties related to internal policy are to contribute toward the "building of communism" through construction of its material-technical basis and through the realization of the moral and political unity of the Soviet people. Since the building of communism is primarily an economic problem, there is little wonder that the economic obligations of members are of primary importance (Art. 2a). A Communist must be a master of production—one who labors heroically and encourages others to peak performance. Newly introduced in the Rules of 1961 is the duty to take part in political life and the affairs of the state. This obligation gains special meaning under conditions of the "all-people's" state, a concept that postulates a progressive takeover of the functions of state organs by social organizations. It was Khrushchev's view that the absolutism of the state should thus give way to the absolutism of the party, which would naturally enhance the role of party members. The idea of the "all-people's" state continues to be officially supported by the Brezhnev-Kosygin leadership.[7]

In order to educate Soviet citizens in the spirit of Marxism-Leninism, the party member must disseminate Communist ideology, defend the priority of social over private interests and support the principles of "Communist morality" (Art. 2d). Of special importance in this context is the struggle against all ideologies that conflict with the general line of the party, particularly religion. While Article 124 of the USSR Constitution guarantees freedom of religion, the question of religious faith, in the Communist view, is a private matter only where the state is concerned, but not where the party is concerned.[8] The "moral code of the builders of communism" (Art. 58h), which originally appeared in the party Program and which the Rules commend for observance by primary organizations of the party, is naturally also the source of individual obligation. Party members are subjected to continuous and time consuming party schooling so as to keep them abreast of the current ideological line.

(2) Another group of duties serve to enhance the leading role and effectiveness of the party: unconditional execution of party decisions (Art. 2b), ideological and organizational unity (Art. 2f), criticism and self-criticism to promote resistance to actions harmful to the party (Art. 2g), undeviating implementation of the party personnel (cadre) policy (Art. 2h), and observation of party and state discipline (Art. 2i). These duties are in essence the concrete expression of the "iron party discipline" which Lenin considered so important for the formation of a strictly centralized fighting organization. The principle of strict subordination requires from every party member total dedication to the common cause, even at the risk of his life. Directives of higher party authorities are to be carried out unquestioningly, without regard to personal views of their propriety. Consideration for one's own conscience

[6] *Spravochnik partiinovo rabotnika* (Party Worker's Handbook), 4th ed., Moscow, 1963, p. 470.

[7] Editorial, "Gosudarstvo vsevo naroda" (The All-People's State), *Pravda*, Dec. 6, 1964.

[8] E. I. Bugaev and B. M. Leibson, *Besedy ob Ustave KPSS* (Talks on the Rules of the CPSU), Moscow, 1962, p. 71.

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thus means dereliction of duty. Party discipline also imposes the obligation of secrecy regarding internal party matters and constant vigilance—both forms of the traditional, and somewhat hysterical, penchant for secrecy in the Soviet Union. Party discipline affects private life as well: a member may leave his domicile and place of work only with the permission of his party organization; on the other hand, he must unquestioningly obey an order to move from one place to another.[9]

(3) Some of the duties of party members fall into the realm of foreign policy. They relate to such matters as "socialist internationalism," Soviet patriotism (Art. 2e), the "struggle for peace and friendship among peoples," and the strengthening of Soviet military might (Art. 2j). Members are obligated to give effect to whatever meaning the party may assign to these terms. Thus the struggle for peace may lead, on party orders, to the duty of carrying out Communist subversive activity abroad or initiating "anti-colonialist" revolutions in underdeveloped countries.

(4) Finally, there is the duty to pay membership dues. The rates are related to the member's income and rise progressively (Art. 70).[10] Apart from contributing to party funds, the dues serve the purpose of reminding the member every month that he belongs to the party.[11] If a member fails to pay dues for three months in succession, his primary organization must inquire whether he has lost contact with the party (Art. 8). In case of affirmative conclusion, the primary organization will pass a decision, subject to local party committee endorsement, that the delinquent has ceased to be a member of the party. Members have also the duty to safeguard their party membership card and to report promptly if it is lost. Loss of the membership card is considered a serious offense, whatever the reason for it may be.[12]

Rights of Party Members

The rights of party members, which were first mentioned in the Rules of 1939, are much fewer than the duties. They include the active and passive electoral right (Art. 3a). The right to be elected, however, is limited by the principle of systematic renewal of party bodies expressed in Article 25, which generally restricts the election of individual functionaries to three, and in the case of primary organizations, to two terms of office. This provision is an innovation

[9] *Ibid.*, p. 76.
[10] Detailed regulations are contained in a CPSU CC resolution of May 29, 1962; for text, see *Spravochnik partiinovo rabotnika*, 1963, pp. 495-507.
[11] M. I. Kalinin, *O politicheskoi agitatsii* (On Political Agitation), Moscow, 1948, pp. 46-47.
[12] E. I. Bugaev and B. M. Leibson, *op. cit.*, p. 87.

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—From Krokodil (Moscow), May 30, 1961.

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of the Rules of 1961, even though, in effect, it only institutionalized Stalin's practice of rotating the *apparatchiki*.[13]

Article 3 (b and c) is concerned with the various forms of participation in party work, including the right to vote, to discuss freely questions of policy in party meetings, to table motions, and to exercise criticism and self-criticism. Free discussion of policy, however, is admissible only until a decision is taken; once adopted, a decision is absolutely binding and must be carried out without contradiction. A considerable limitation on the free formation of opinion is the prohibition of factionalism and group activity that may unite various members around some policy issue. Any internal opposition is thus excluded. A group defeated in a power struggle becomes automatically guilty of factionalism, as was last demonstrated in 1957 in the case of the "anti-party group" led by Molotov, Malenkov and Kaganovich.

The old Roman law principle of "*audiatur et altera pars*" is given voice in Article 3(d), which affords a member the right to attend in person all party meetings where his activities or conduct are discussed. Every member also has the right to address a petition to any party body, up to and including the Central Committee of the CPSU (Art. 3e).

The rights of candidate members are limited to the extent that they enjoy only a consultative voice and may not be elected to any leading party body or as delegates to a conference or congress (Art. 17).

Disciplinary Measures and Expulsion

Against a member who has violated his duties the party may, according to Article 9, institute educational measures or disciplinary proceedings. The educational measures are applied in case of insignificant offenses, and may consist of "comradely criticism," party censure, warning or reproof. The disciplinary penalties include the following gradations: admonition, reprimand (or severe reprimand), censure (or severe censure) with entry in the registration card, reduction to the status of candidate member, and expulsion from the party. As the highest penalty, expulsion is to be resorted to only in extremely severe cases, and detailed guidance is provided for such proceedings. Reportedly, some 50,000 expulsions occur yearly, amounting to 0.5 percent of the entire party membership.[14] The subsequent fate of expelled members is extraordinarily difficult; they belong to the disinherited in Soviet society.

Primary organizations take decisions on disciplinary measures by a simple majority vote of the general meeting; only in the case of expulsion is an affirmative vote of two thirds of those attending required. Reduction to candidate status requires the endorsement of the local, and expulsion also of the regional, party committee or possibly even the Central Committee of the CPSU. A member who commits an indictable offense is subject to mandatory expulsion (Art. 12), whether or not a lawful verdict has been passed. Should the accused be subsequently adjudged not guilty, the expulsion order stands but the primary organization is bound to review the case anew.[15] Members condemned to a disciplinary penalty, including expulsion, have the right of appeal to superior party bodies all the way up to the Central Committee of the CPSU—a right that is grounded in the freedom of petition guaranteed by Article 3e. Such appeals must be examined by the appropriate party bodies within one month from their receipt (Art. 13). At the local committee level, they may be reviewed by the already mentioned auxiliary commissions; at the CPSU Central Committee, they are considered before a party commission formed in November 1962 under the chairmanship of N. M. Shvernik.

In respect to proceedings against members or candidate members of local or regional party committees, as well as against members of many auditing commissions, the Rules provisions are not specific (Arts. 11 and 26). It is likely that in such cases the primary organizations may offer recommendations but not pass decisions.[16] There is only the clear provision that decisions of expulsion must be approved by a two-thirds vote of the plenary meeting of a party committee or auditing commission. Members and candidate members of the Central Committee of the CPSU may be expelled only by decision of the party Congress or a two-thirds majority of the Central Committee. That, however, such formal procedure is in fact not always used has become apparent since the fall of Khrushchev last October. While the former First Secretary technically remains a member of the Central Committee, he no longer takes part in its proceedings.

[13] B. Meissner, "Die Sowjetunion vor dem XXII Parteikongress; Parteiführung and Parteiorganisation," *Osteuropa* (Stuttgart), No. 10, 1961, p. 696.

[14] J. A. Armstrong, *Ideology, Politics, and Government in the Soviet Union*, New York, 1963, p. 52.

[15] V. Gorin and M. Karpov, *op. cit.*, p. 70.

[16] *Cf.* L. Shapiro, "The New Rules of the CPSU," *The USSR and the Future*, ed. by L. Schapiro, New York and London, 1963, p. 189.

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Soviet Criminal Law

By Kazimierz Grzybowski

Modern criminal law has been profoundly affected by the philosophers of the French Revolution, who adopted a scientific and systematic approach to the problem of crime in the social context. They believed optimistically that in order to combat crime, deeds prohibited by law must be scientifically determined, crime prosecution must be prompt, and penalties must be humane. Baccaria, one of the most advanced thinkers of the time, was convinced that harsh punishments contributed to the brutalization of the social psyche. He proposed a total abolition of the death penalty except for crimes against social order, which were to be established on the basis of social contract. Since that time there has been a constant evolution toward a more humane legal policy in many countries of the West.

As part of this development, the basic object of scientific inquiry into the causes of crimes has been the person of the offender, seen against the background of social conditions in general and the special situations that lead to the formation of the criminal personality. Nearly two centuries of constant inquiry into the causes and forms of criminality, as well as systematic adaptation of the laws to changing social conditions, have strengthened the belief in the need for scholarly, scientific study as the basis of criminal policy.

At the same time, the growing body of information on the social roots of crime and on the criminal personality has dampened the mood of optimism conveyed by the founding fathers of modern criminal science. The present mood of jurists and sociologists concerned with criminal law, crime prevention, and the rehabilitation of criminals, is opposed to sweeping generalizations and theorizing. Modern criminologists are convinced that there is no easy and sure method for curing the social ills of which individual criminal deeds are a symptom.

Veteran readers will remember Mr. Grzybowski from his "History in the Remaking" which appeared in the March-April 1962 issue. He is an American specialist on Soviet and East European law and government, and the author of Socialist Commonwealth of Nations *(New Haven, Yale University Press, 1964).*

Stalinist Justice

In the most general sense, the shortcomings of Soviet criminal legislation and penal policy, particularly during the Stalin era but also in

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the period since, arise from the fact that Soviet legislators and jurists have failed to profit from the lessons of modern criminal science and have clung to the doctrinaire notion that communism of its own virtue can and will eradicate crime in all its manifestations.

In the initial period Soviet lawmaking was influenced by the teachings of E. B. Pashukanis, who brilliantly, but unrealistically, advanced the thesis that the new society emerging from the revolution must reform its criminal laws by departing from the contractual principle in criminal law. The idea of contract, which had permeated the institutions of criminal law in the West, simply expressed, in his words, the fact that the offender knows "the amount of freedom which he pays as a result of the court arrangement." Instead he suggested that the penalty be converted into a measure of expediency for safeguarding society and correcting the socially dangerous personality. Soviet law would require no definitions of crimes, nor would the measure of social defense administered by the courts need strict and precise formulation, since that would again restore the contractual principle in criminal law. In this view, criminal legal science was also unnecessary.[1]

Such thinking was hardly conducive to the emergence of an orderly code of criminal law. Aside from the difficulties involved in expressing an entirely new revolutionary ideology in criminal law, the early Soviet jurists were not professionally equipped to draft a basic code embodying significant innovations either in the techniques of lawmaking or in the prevention and suppression of crime. What they eventually produced was the RSFSR Criminal Code of 1926, which from the start was a poor instrument for the administration of justice (in any meaningful sense of the term) and which was soon subjected to constant amendment. Made ever more cumbersome by inexpertly prepared insertions, the Code became a shapeless mass of penal provisions lacking a central idea or even a formal order. The later jurists and legislators who added to the Code had little concern for preserving its initial precepts or even its terminology. In short, from the early period on, the climate of legal legislative work was characterized by lack of experience, lack of concern with the technical aspects of legislative techniques, and an inclination, even among the leading jurists, to look at things from the political-ideological rather than the legal point of view.

One of the notable features of the 1926 Criminal Code was the analogy clause (Article 16), which permitted the imposition of criminal liability for a socially dangerous act not expressly proscribed by criminal statute—thus allowing the regime a free hand in punishing people whose actions it considered contrary to its political or economic interests.

Another feature of criminal law in the Stalin era was that criminal liability was determined by objective criteria of the criminal act, and not by the degree of personal guilt of the offender. In the modern criminal codes of most Western countries, liability to punishment, as well as the type and severity of punishment, are related to the form and degree of the subjective intent of the offender. Absolute liability, based on the objective criterion of responsibility—assuring that penalty follows the deed irrespective of the offender's intent—is relatively rare in Western criminal legislation; it is applied mainly to minor transgressions (such as violation of traffic regulations), where the law expressly provides for it.

By contrast, the criminal law of the Stalin era did not distinguish between various criminal acts on the basis of the degree of guilt. The Code of 1926 defined as crimes all socially dangerous acts, punishable regardless whether they were committed with intent or through negligence. A Soviet judge was not instructed to examine the degree of guilt, but rather was authorized to impose penalties according to the degree of social danger a given criminal act represented.

In general effect, then, the statutes and practices characterizing criminal law in the Stalin era provided a convenient tool for the enforcement of governmental policy in various fields of social and public life of Russia, but they were totally inadequate insofar as the protection of human and individual rights was concerned.

Judicial Iniquities

The Stalinist administration of justice was even more significantly affected by the poor quality of the Soviet courts and the lack of trained lawyers on the Soviet bench. The courts were encouraged to impose harsh penalties whenever important governmental interests called for preventive measures. Soviet judges faced a situation in which socialist construction, which signified the constant expansion of governmental controls in various areas of social and economic activity, was accompanied

[1] E. B. Pashukanis, "The General Theory of Law and Marxism": see *Soviet Legal Theory*, 1951, pp. 221-25.

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by the parallel proliferation of extremely severe penalties. According to one eminent authority, the late Vladimir Gsovski, at one time during the Stalin regime Soviet criminal law stipulated the dealth penalty for 74 crimes, some of them described in terms so vague as to allow a high degree of judicial arbitrariness. In 32 types of crime the death penalty was mandatory.[2]

Originally the Code of 1926 stated that minors under 16 were not subject to its provisions, and they were dealt with under separate rules. In 1935 the Code was amended to lower the general age of responsibility to 14 and to provide that "minors who have reached 12 years of age, and are accused of larceny, violence, bodily injury, maiming, murder, or attempted murder, shall be tried by the criminal court, which may impose upon them any kind of punishment." In 1941 the latter provision was broadened by the addition of other crimes to the list.

Brutalization of the criminal law in the Soviet Union was matched by the general tendency of the regime to use violence as a tool of "social reconstruction." Soviet judges were constantly plied with two clichés encouraging them to stamp out all manifestations of hostility to the Soviet social and economic order. In the first place, the ideology treated it as axiomatic that the closer socialist society moved towards communism, the more bitter would be the resistance of the class enemy—and any criminal violation of the new social and economic order automatically put the offender in the class enemy category. In the second place, crime, according to the applied theory, constituted a remnant of the capitalist order, and as socialist construction moved forward there would be less and less justification for criminal activity. Consequently, manifestations of criminality—constituting "exceptional" behavior in the society—would call for even stronger measures in order to hasten the arrival of the millenium. What this meant for criminal law was clearly expressed by Professor V. M. Chkhikvadze in 1952:

Any interpretation of criminal law is primarily a political interpretation. This fact is camouflaged by the bourgeois jurists who think that by acknowledging a political interpretation of criminal laws they would admit thereby the reactionary content of bourgeois laws. The Soviet science of criminal law declares openly that the interpretation of criminal laws is a political interpretation. The only correct and truly scholarly interpretation of criminal law is an interpretation permeated by Communist partisanship.[3]

There was a good deal of awareness of the unsatisfactory state of Soviet criminal law in the highest circles of the legal profession, and there were intermittent attempts to bring order and system to its various parts. However, so long as Stalin lived no major revision of the basic assumptions underlying the Soviet system of repression could be attempted. Indeed, not until Stalin was repudiated did a movement for the reform of the Soviet legal system get underway.

In Search of Legality

After the 20th Party Congress in 1956 the immediate task set forth was to repair the damage done to the Soviet ship of state by Stalin's one-man rule. As far as criminal law was concerned, this meant a review of the whole system of administering justice and the enactment of new codes. In December 1958 the Supreme Soviet adopted fourteen laws which laid the foundations for the reform, outlining principles to serve as the guidelines for new criminal codes, for codes of criminal procedure, and for the organization of the courts. Separate laws dealt with crimes against the state, military crimes, and military courts.[4] In 1960 the Criminal Code of the RSFSR was enacted, providing a model for conforming codes in the other Soviet republics.

The content and effect of these measures were a mixed blessing. In some areas they initiated important liberalizing reforms. In other respects they fell woefully short of the revamping needed. Perhaps worst of all, they failed to eliminate certain Stalinist concepts and institutions that have since gained disturbing new ground, as we shall see.

On the positive side, one of the most significant aspects of the 1958 legislation was a reform enhancing the role of due process of law in the Soviet legal order. Article 3 of the 1958 "Basic Principles of Criminal Legislation of the USSR and of the Union Repub-

[2] V. Gsovski and K. Grzybowski, *Government, Law and Courts in the Soviet Union and Eastern Europe*, London, Stevens and Sons Ltd., 1959, Vol. 2, pp. 939-40.

[3] V. M. Chkhikvadze, *Sovetskoe ugolovnoe pravo, obshchaia chast*, Izdatelstvo yuridicheskoi literatury, 1952, pp. 115-16.

[4] *Vedomosti Verkhovnovo Soveta* (Moscow), No. 1, 1959.

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lics" adopted the traditional liberal position that only acts expressly defined as criminal by statute are liable to punishment:

Only persons guilty of committing a crime, that is, those who intentionally or by negligence have committed a socially dangerous act specified by the criminal statute, shall be held responsible and incur punishment.[5]

With the enactment of this Article the notorious analogy clause, which had permitted prosecution and punishment for acts not expressly defined in the law, was at last removed from the Soviet legal system.

The effort to make Soviet criminal law more humane was also eloquently reflected in provisions of the 1958 reforms bearing on the treatment of juveniles. Under Stalinist law juveniles had been treated as adults after reaching the age of 14 years. As noted earlier, in a number of more serious crimes the age of responsibility had been lowered to 12 years, with no restriction on the kinds and types of penalty to be applied, including even the death penalty. Under the new rules introduced in 1958, minors under 14 were exempted from liability for criminal prosecution. Those over 14 and not more than 16 were made criminally liable only for such extreme offenses as murder, rape, and serious bodily harm. Between 16 and 18 they were designated liable as adults, with the modification that if the youthful offender could be reformed without the imposition of penalty, the court might refrain from imposing one—provided, however, the offense did not represent a great social danger. In that case the court was directed to apply coercive educational measures. Otherwise, the 16 to 18-year-olds were made subject to the same penalties as adults, with the reservation that they could not be sentenced to banishment or death.

Important changes were also introduced in the rules governing proceedings in criminal cases. Article 14 of the decree on "Principles of Criminal Procedure" adopted the concept concerning the burden of proof that is basic to all procedural systems in the Western world. It stated that "neither the court, the prosecutor, nor the investigating agent has the right to impose the duty of furnishing proof on the defendant." The implicit assumption is that until guilt is proved, the defendant is presumed innocent. Article 43 of the same law stated further that "Conviction cannot be based on suppositions, and may be decreed only when in the course of the trial the guilt of the accused in committing the crime has been proved." [6]

Still another step that seemed generally promising was the new system of penalties adopted in 1958. The reform measures reduced the number of penalties from 18 (Code of 1926) to eight, retaining, however, the most traditional punishments in Russia—exile and expulsion. The maximum prison sentence for certain crimes was reduced from 15 to 10 years, and for more serious crimes from 25 to 15 years. The death penalty was provided for treason, espionage, subversion, terroristic activities, banditry and murder, and in time of war for the most serious military crime—but in no case was a sentence of death made mandatory. (Recent retreats in the matter of capital punishment will be discussed shortly.)

Injustices Perpetuated

At the same time, the reforms contained a number of highly negative features. One of them was the preservation of the penalty of general confiscation of property, which the 1958 legislation in fact imposed as an additional penalty for the most serious crimes. (The confiscation of criminals' property, a common feature of medieval criminal law, had disappeared from modern criminal legislation in the West after the French Declaration "des droits de l'homme et du citoyen.")

There were, however, more serious shortcomings in the reform measures. In the first place, while the "Basic Principles of Criminal Legislation" established that nobody could be prosecuted for deeds which were not declared punishable, they failed to determine clearly how the degree of criminal responsibility should be related to the degree of guilt of the offender. Article 7 of the Principles of Criminal Legislation defined as crime any socially dangerous act (of commission or omission) directed against the Soviet social and political order, the economic system, etc., if so specified by the state; it also distinguished between criminal intent and negligence as separate forms of guilt but drew no conclusions from this distinction. Thus it was left up to the drafters of the RSFSR Code of 1960 to distinguish between intent and negligence in that section of the Code where specific crimes

[5] *Ibid.*

[6] *Ibid.*

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are defined; and where the distinction was not expressly provided in the definition of separate crimes, the court itself was left to face the problem of weighing intent or negligence.

In addition, the 1958 legislation preserved the concept of "social danger" as an essential element of criminal acts. This concept, which had contributed fundamentally to the character of Stalinist "justice," stipulates that the degree of social danger which a given criminal act represents provides the key determinant of the gravity of the act. In both the law and the court practice of Stalin's era the issue of social danger was interpreted crudely. It was the amount of actual damage done which decided both the classification of the criminal act and the penalty which was deserved. This attitude precluded any thorough examination of the circumstances of individual cases as well as any attempt to determine the degree of guilt involved; it thereby made application of fair and proper penal measures impossible.

The aforementioned Article 7 of the Principles of Criminal Legislation retained the notion of "social danger" as follows:

As crime shall be considered, if it is so specified by a criminal statute, any socially dangerous act . . . attacking the Soviet social or political order, the socialist system of economy, socialist property; persons; political, labor, property, or other rights of the citizens; as well as any other socially dangerous act attacking the socialist legal order, if so specified by a criminal statute.

This definition—which is hardly a model of clarity and precision—in effect perpetuated the attitude of the Stalinist era, directing the attention of Soviet courts to the element of social danger as a crucial consideration in the disposition of individual cases.

The doctrine of social danger is known to all criminal legislations. It expresses the basic justification for the prohibition of certain acts under the sanction of penalty, as each society protects those institutions, assumptions or social values which are fundamental in its public order. The difference between the traditional and socialist use of the concept of social danger begins at the moment when courts come into play. In the socialist legal system the courts are enjoined to take social danger into account in their determinations; in the traditional system, the function of the courts is rather to focus their attention upon the personal character of the offender and other specific circumstances of the case.

In 1960, a Soviet jurist named Utevski made an effort to reduce the issue of social danger to proper proportions. His comments were offered in connection with the plans then being publicized for drawing social organizations into the process of law enforcement (a subject discussed elsewhere in this issue). Utevski pointed out that the notion that a criminal act must produce a single type of reaction in the form of court punishment had become obsolete. Under the new or pending reforms, he argued, the reaction of society to a criminal act could take any of three forms. First, a guilty person might be subject by court decision to educational measures which would engage social action as the chief element of social defense. Secondly, in certain categories of offenses, the case might be transmitted to a social organization (*e.g.*, a "comrades court"), taking the place of a judicial procedure. Thirdly, there was a possibility of dealing with the case and applying educational measures without formal sentence being passed either by the courts or social organizations. This called, in Utevski's opinion, for a new approach to individual cases, stressing a careful study of the personality of the offender as the basis for determining the proper course of action.[7]

Despite some airing of the issue, however, the preservation of emphasis on "social danger" in the 1958 Principles of Criminal Legislation assured survival of the concept in the Criminal Code of the RSFSR and in the subsequent codes of the other republics.

A final fundamental shortcoming of the reforms initiated in 1958 was their failure to attack the real weaknesses of the Soviet court system and the conduct of criminal trials. While the Principles of Criminal Procedure made some progress toward protecting the rights of accused persons, the fact remains that Soviet criminal trials are today conducted much as they were in the Stalin era. Proceedings in criminal cases are still dominated by the person of the "public procurator," who combines in his office the functions of prosecutor (a party in the trial) and guardian of legality. His position is further strengthened by the fact that he controls pre-trial investigations, conducted either through the militia

[7] B. S. Utevskii, "Voprosy ugolovnovo prava v proiekte zakona," *Sovetskoe gosudarstvo i pravo* (Moscow), No. 1, 1960, pp. 116-19.

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or through a team of special investigators. As a professional lawyer and an appointed government official with permanent status, he commands much more authority than does the court judge, whose office is "elective" and temporary and who is not even required to have had legal training or experience. If, on occasion, a judge should decide against the recommendations of the procurator's office, the procurator has the power to appeal or even to reopen the case. In these circumstances, the defendant's only "guarantee" of fair treatment rests in the notion that the procurator and his staff will be impartial servants of the law.

The injustice inherent in this setup is compounded by the persistence in the judicial system of certain habits and attitudes rooted in Stalinist practice, which survive because there has been little elaboration of new techniques and practices that could permit an impartial administration of justice.

An example of such attitudes was cited by a public prosecutor of the Moscow region, who in an article of 1960 criticized the manner of conducting pre-trial investigations. He protested in particular that investigators were predisposed to prove the guilt of accused persons rather than to examine the facts impartially and protect the innocent from being brought to trial:

Tendentiousness, lack of objectivity, prejudicial inclination to produce a criminal charge in the examination of criminal cases (obvinitelnyi uklon) *lead to serious mistakes. When we talk of the prejudicial inclination to prove a criminal charge we have in mind such activities of the inquisitorial, procuratorial and judicial authorities as lead to unfounded accusations or illegal imposition of harsher penalties. Sometimes this prejudicial tendency is revealed in cases involving innocent persons.*[8]

Other Soviet jurists who joined in public discussion of the legal reforms produced abundant evidence of errors and abuses of power in the judicial system due to the improper understanding of the judicial function. Many actual cases were quoted and described, suggesting that Soviet courts—ill-equipped to sift evidence and evaluate its import as regards the issue of guilt or innocence—were inclined to impose penalties harsher than deserved and to qualify offenses as crimes more serious than was warranted. In some cases, the courts erred by applying a literal interpretation of legal rules, taking no account of actual conditions or extenuating circumstances. One example cited involved the prosecution of Soviet citizens for using certain proscribed metals, although items made of such metal were at the time available in government stores.[9]

To summarize, then, despite the several positive innovations of the legal reforms, they preserved crucial features of the old system of administering justice, and thereby failed to close off the avenues through which a return toward Stalinist practices could be effected. In the area of criminal law, the reforms did not postulate a uniform application of the principles of criminal responsibility to all categories of crimes; rather, they singled out certain crimes to be judged by standards tending toward absolute responsibility, without regard to the intent or to the personal record of the defendant. At the same time the fundamental characteristics of the court system of the Stalinist period were preserved. Thus both the courts and the criminal law retained the potential for serving again as tools of political repression. A change of emphasis was all that was needed to redirect the judicial system toward the resumption of its former role.

New Winds

This change of emphasis was provided by the 21st CPSU Congress of 1959. In a sudden show of zeal, the party leadership announced that the time had come to reorganize all phases of Soviet life in order to move farther ahead on the road to communism—and that toward this end it was necessary to introduce new standards of social and personal behavior in Soviet society. The effect on the program of legal reform was direct and drastic. Under the guidelines issued by the 20th Party Congress, the efforts at reform had been concentrated on establishing judicial guarantees of individual rights—within the context of the Soviet legal system, of course, but as part of the general course of repudiating Stalinism. After the new call to "move forward" toward communism, there was an abrupt change of attitude toward crime and the treatment of criminals. For one thing, Soviet theorists began justifying a policy of harsher suppression

[8] S. O. Urakov, "Povisit kulturu sledstva," *Sotsialisticheskaia zakonnost* (Moscow), No. 7, 1960, pp. 12-16.

[9] V. M. Kozak, "Otvestvennost za zaniatie zapreshchonnymi promyslami," *ibid.*, No. 3, 1958, p. 37.

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of crime even during the period of transition leading to "full communism." Secondly, they revived the basically Stalinist concept that all causes of criminality are remnants of the past, a survival of capitalism in the minds of the people. According to Soviet criminologists working to implement the decisions of the 21st Party Congress, the attitudes that lead to crime—cupidity, revenge, jealousy, *etc.*,—were the result of social consciousness lagging behind social and economic development. There was no basis for these crimes in Soviet society, and with proper criminal policy they were doomed to disappear.[10]

This is not the place to examine in detail the conditions in Soviet society that promoted the change of course. It seems certain, however, that it was caused in part by the rise of various new forms of criminal activity connected with the relaxation of economic controls and the greater availability of consumer goods. In these conditions the regime deemed it impossible to fulfill the promises made in the General Principles of Criminal Legislation and other measures of the reform program.

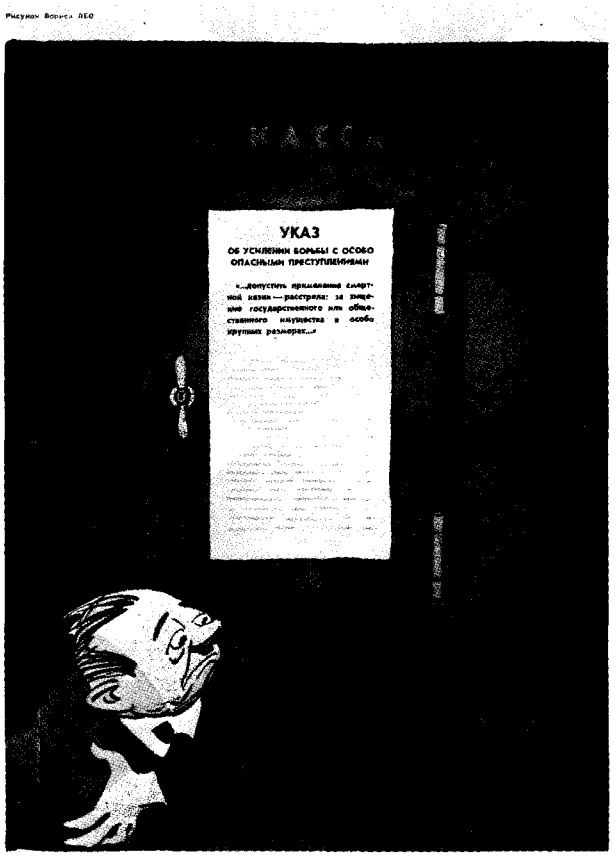
The first breach occurred with the adoption of a new method of control over private life, amounting in reality to non-judicial repression without the usual judicial guarantees (this was the effect of the anti-parasite legislation and the law on public participation in crime prevention, discussed separately in this issue).

The second breach was the enactment of a series of special decrees in 1961-62, which both in form and in substance violated the 1958 reforms. The resort to special decrees was in itself in the best Stalinist tradition, replacing the concept of an orderly enforcement of criminal legislation, inspired by central principles of criminal policy, with a system of radical campaigns designed for the protection of special interests. In short, the regime went back on the promise (implicit in the reform) that Soviet criminal law would be stable and that criminal policy would be aimed at the general prevention of crime rather than geared to the objectives of a given moment.

Moreover, the effect of the decrees was to introduce new crimes and harsher penalties into the criminal codes. Their most serious feature was a wide application of the death penalty, against an express promise contained in Article 22 of the General Principles that the death penalty would be an exceptional penal measure confined to a few most serious offenses.

The decrees in question were enacted in a period of over a year following the coming into force of the 1960 Criminal Code of the RSFSR. The first decree, issued on March 25, 1961, sharply increased penalties for illegal currency transactions when of a serious nature or committed by professional criminals. The second, enacted May 5, authorized death by shooting as a penalty for a number of economic crimes (including theft of state and social property, and professional counterfeiting), as well as for other crimes committed by recidivists or by convicts serving sentences

GRISLY HUMOR



Не трогать! Смертельно!

The above cartoon appeared shortly after the publication, in May 1961, of a decree extending the death penalty for a variety of crimes, including production or circulation of counterfeit money, theft of state property "in especially large amounts," and bribery. Part of the decree appears on the safe; underneath the caption reads: "Don't touch! Deadly!"

From Krokodil *(Moscow), May 30, 1961.*

[10] See G. E. Aleksieiev, "O zakonomenostiakh razvitiia sovetskovo gosudarstva i prava," *Sovetskoe gosudarstvo i pravo*, No. 3, 1960, pp. 34-38. See also No. 11, 1960, of the same journal, pp. 59-68.

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for serious crimes. A decree of May 24 penalized fraud in planning accounts. A decree of July 1 again raised the penalties for serious forms of illegal currency transactions, this time providing for capital punishment. A decree of February 15, 1962, introduced new disciplinary measures—including the death penalty in serious cases—for offenses against members of the militia and of the Voluntary People's Brigades. A second decree of the same date provided a death penalty for aggravated cases of rape. Finally, a decree of February 20, 1962, provided increased penalties, including death, for bribe-taking by officials.

In the wake of this new legislation, the atmosphere of law enforcement has also undergone a change. The Supreme Court of the USSR, in instructions to lower courts concerning cases that had been tried under the new decrees, sounded a warning note against underestimation of the social danger of economic crimes. It asserted that:

. . . in hearing cases of [especially dangerous] crimes, the courts commit serious errors which consist in an underappraisal of the social danger of these crimes and the resultant imposition of light penalties, particularly in cases of the pilfering of state or public property in especially large amounts.[11]

Also instructive is the new emphasis—evocative of Stalinist notions—placed on the role of the state and the party in the period of socialist construction. Typical is a statement by N. R. Mironov, head of the Section for Administrative Organs in the CPSU Central Committee:

It is not the incidence (of particularly dangerous crimes) which has grown, but rather the implacability of the Soviet people to all elements that bring shame on Soviet society and mar Soviet life. . . . Some people think that the intensification of judicial repression affecting especially dangerous crimes contradicts the course taken by the party towards further restriction of the state's administrative and punitive functions and their gradual replacement by the methods of public influence and indoctrination. It is impossible to agree with this.

In fact, Mironov asserts, although the number of criminals is comparatively insignificant, those few who still continue in criminal activities cannot be deterred except by the threat of physical destruction.[12]

Some of the practical effects of the new course may be gauged from the first case tried under the special decrees. Under the aforementioned decree of March 25, 1961, three men named Rokotov, Faibishenko and Edlis were sentenced by the Moscow City Court to maximum prison terms of 15 years for illegal dealings in valuables and foreign currencies. The Prosecutor General appealed the sentence. The case went to the Supreme Court of the RSFSR, which tried the defendants under the terms of the second decree on illegal currency transactions, which had meanwhile been enacted on July 1, 1961. This time the trio was sentenced to death by shooting.[13]

The proceedings in this case were obviously irregular. It may be assumed that the bulk of the defendants' criminal activities took place prior to the enactment of the March 1961 decree since the first trial took place in June. If that was the case, then the first sentence of the Moscow City Court was already in violation of Article 6 of the General Principles of Criminal Legislation, which ruled:

Whether an act is criminal and punishable is determined by the law in force at the time of its commission. . . . A law which makes an action punishable or increases the penalty has no retroactive force.

Even more patently illegal was the appeal of the Prosecutor. Although the defendants were given the maximum sentence allowed under the March decree, he appealed for a stiffer sentence *before* the July decree authorizing higher penalties was enacted. The Moscow City Court had already transgressed its powers, and the appeal should have been thrown out of court. Nevertheless, the RSFSR Supreme Court reviewed the case—applying the July decree to impose a death sentence.

Thus it seems that the old habits of a cavalier attitude toward law and legality die hard in the Soviet administration of justice, and that the letter of the law and its actual

[11] *Pravda*, Sept. 4, 1961.

[12] N. R. Mironov, "Strengthen Legality, Law and Order," *Partiinaia zhizn* (Moscow), No. 5, 1962.

[13] *Pravda*, June 16 and July 21, 1961.

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practice are worlds apart. Yet if the overall trend of recent Soviet law has been disappointing and even ominous, there is one brighter side of the picture that ought to be noted. There are those in the Soviet legal wilderness who have not been afraid to speak out in vigorous protest against the persistence of Stalinist attitudes and in defense of the liberal principles promised in 1958—and occasionally they have scored their points. One of the most interesting developments in this respect was a public discussion that eventually involved a libel suit, growing initially out of an exchange of views in the journal *Literaturnaia gazeta* on the issue of presumption of innocence *vs.* presumption of guilt. In an article of May 23, 1964, the eminent Soviet jurist M. S. Strogovich had argued, with reference to concrete cases, that unless guilt is fully proven a court should pass the verdict of not guilty. He then added:

. . . in the period of the cult of the individual, a "theory" was current among practical workers and theoreticians in the law that "maximum probability" of guilt was sufficient for conviction. Everyone knows the damage this "theory" did to our society. Frequently, the source of error in investigatory and court work lies in equating an accused person with a guilty one, in regarding a person on trial as a person convicted. . . . Such reasoning involves prejudice, a one-sided accusatory approach to trying the case.

In *Literaturnaia gazeta* of August 16, 1964, an Assistant Prosecutor named G. Filimonov from the Cheliabinsk District rebutted Strogovich's argument as follows:

The law gives the investigatory agencies the right to bring charges against someone, to interrogate him as the accused, and hence to recognize him as guilty. And the prosecutor brings to trial and, in criminal proceedings, accuses a person who is already guilty in the eyes of the investigatory agencies, i.e., *in the eyes of authorities. And the court merely verifies to what extent the individual brought to trial and accused by the prosecutor is guilty. . . .*

Filimonov was without doubt adequately describing the prevailing practice of the Soviet courts. But his blunt way of stating the facts was an open invitation to criticism. On Sept. 10, 1964, *Izvestia* carried an article by O. Chaikovskaia, who traced the origin of Filimonov's views to the Stalin period, and added that he was far from being an isolated phenomenon:

The ignorance, with which we are dealing here is malignant. In the years of the cult of the individual, they would come for a man in the night, and by morning he would already be called an enemy of the people.

She followed this statement with a short treatise on the basic principles of fair criminal procedure: the need for an open trial, with public examination of the charges and evidence against the accused; the role of the defense; the role of the courts and the need for their independence.

The Strogovich-Chaikovskaia position was further upheld by A. Gorkin, Chairman of the Supreme Court of the USSR, who wrote in *Izvestia* of Dec. 1, 1964:

In present-day conditions . . . the strengthening of the citizen's rights and of the inviolability of the person, freedom, honor and dignity of man constitute one of the most important demands of the party.

The matter might have ended there, except that Filimonov considered Chaikovskaia's article an insult to his honor and instituted libel proceedings against her and also against *Izvestia.* He duly lost his case on the basis that his position was clearly contrary to the Basic Principles of Criminal Procedure adopted in 1958. *Izvestia,* reporting the trial (Dec. 19, 1964), again upbraided him for his mistakes and enjoined him to mend his ways.

The final word belonged to Strogovich, who in the December 17 issue of *Literaturnaia gazeta* dealt with the main issues of the controversy, and drew lessons from it. Strogovich stressed again that Filimonov was only one of many like-minded colleagues; that his views are echoed not only by practitioners of law, but in the "pseudo-scientific works" of a number of scholars in institutions of higher learning. The root cause of such attitudes, said Strogovich, is a contempt for legal theory, including contempt for the changes introduced by the reform legislation: it is still little understood that to have a system of justice worth its name, it is essential to insist on a high caliber of judges, able to uphold the independence of the courts *vis-à-vis* the prosecution, and capable of objective examination of all the circumstances of a case *sub judice.* In short, without objectivity, justice is impossible. To support his viewpoint, Strogovich cited vari-

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ous actual examples of judicial practice where the principles of impartiality and objectivity had been ignored. One may wonder how many innocents are still victims of Stalinist juristic thinking in other cases which have escaped the limelight of public attention.

It is perhaps natural that after the many dark years of Stalinism, the principle of legality for its own sake must struggle as a weak plant in Soviet soil. Those Soviet jurists who have made an effort to restore a pristine meaning to basic legal concepts deserve admiration, and their example offers hope that a new generation of jurists armed with a better law will eventually replace the Filimonovs entrenched in the Soviet *prokuratura*. Whatever the direction of development, it is clear that "socialist legality" will never be a reality in any meaningful sense until it becomes both an aim in itself and at the same time a means to protect the rights and dignity of the individual in a maturing industrial society.

The Lawyer and Soviet Society

By Andreas Bilinsky

The essential characteristic of the independent lawyer's profession is that it normally brings him into contact with the state agencies of judicial administration—public prosecutors, investigating magistrates, and the courts—as the advocate, not of his own rights, but of the rights and interests of his client. In a state founded upon the principle that every individual possesses certain inherent rights which can be made to prevail even against the interests of the state itself, the lawyer naturally plays a much broader and more effective role than he does in a state which negates the existence of any such inherent rights and recognizes the "rights and legal interests" of the citizen only insofar as they coincide with the interests of the state or society. The latter is the case in a "socialist" state of the Soviet type.

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In the absolutist Russia of the first half of the 19th century, there was no such institution as an organized bar, and the defense of an accused in criminal proceedings was part of the duties of the state prosecutor. This remained the situation until the Judicial Reform of 1864, which made provision for so-called "sworn attorneys-at-law" (*prisyazhnye poverennie*) as members of an independent legal profession. They protected the interests of private parties in civil litigations and took charge of the defense in criminal prosecutions. The requirements for eligibility to the bar were an unblemished personal record, legal training through the university level, and five years of preparatory practice in the office of a public prosecutor or an already accredited attorney. For his services, an attorney received fees as fixed either at his own discretion or by agreement with his client. Accredited attorneys as a group were bound together in a self-governing association, whose council (*soviet prisyazhnykh poverennykh*) numbered among its functions the admission of new candidates to the profession. It

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was from the ranks of these professional lawyers that most of the champions of political and economic liberalism in prerevolutionary Russia sprang.

In addition to the sworn attorney-at-law, there were also so-called private attorneys (*chastnye poverennye*). The latter were not university-trained but were permitted to act as legal representatives in court trials because of the scarcity of fully qualified lawyers. Close relatives of the parties to trial proceedings also were allowed to act as their authorized representatives in the courts. In justice-of-the-peace courts, every private citizen had the right to act as attorney in three cases per year.[1]

The Postrevolutionary Period

The liberal trend that manifested itself in the development of Russian legal institutions subsequent to the 1864 reform was interrupted by the overthrow of the Tsarist regime in 1917. Viewing the judicial organs of the "bourgeois" state as part of its "bureaucratic apparatus," the Bolsheviks smashed the Tsarist courts and abolished both the state procuracy (public prosecutors) and the organized bar. The courts were to be replaced by tribunals chosen by "society," and the problem of prosecution and defense was to be resolved on a social basis.[2]

Initially, a move was made to confer the functions of prosecution and defense on any private citizens who entered their names on voluntary lists of "social" prosecutors and defenders. However, after this scheme failed, the courts were provided in 1918 with locally-appointed panels of "legal representatives" (*pravozastupniki*) which were to supply both prosecutors and defense counsels. An accused was to be allowed free choice of a defense counsel from these panels. This experiment, too, however, proved a failure. As D. I. Kurski, then People's Commissar of Justice, observed, one of the reasons was that:

. . . there were few attorneys-at-law and it was impossible to accept into their ranks skilled professionals of the bourgeois bar who at that time stood without exception on the side of the enemies of the working class. As a result, the college of legal representatives turned into a poor copy of the former association of sworn attorneys-at-law.[3]

In the search for a "socialist" solution of the problem of legal representation, two opposing viewpoints emerged. One held that defense attorneys (as well as prosecutors and court judges) should be "men of the people," the other that they should be government officials. The latter view prevailed in the decree of November 30, 1918, which provided that all district and provincial executive committees should set up "colleges of defense counsels" who would be state functionaries drawing salaries similar to those of people's judges. Conduct of the defense in court trials was made their official duty. However, since criminal trials in the people's courts were conducted without regard for formal rules, it became the dominant view that the institution of defense counsel was altogether superfluous.[4]

The breakdown of "war communism" and the substitution of the so-called "new economic policy" (NEP), involving a restoration of private enterprise and the free market, brought about a basic reform of the judicial system. The "withering away of law" was postponed indefinitely and a whole series of new legal codes drawn up—criminal and civil codes, codes of criminal and civil procedure, a labor code, a family code, and so on. This meant that judges and state attorneys would require thorough legal training in order to be able to deal with cases according to the new laws. The reform did not go so far as to abolish the popular election of judges lest this detract from the "socialist" character of the courts; however, judges were now to be "elected" from a cadre of nominees designated by the party apparatus. And so, there was a gradual return to a judiciary organized along West European lines, with a supreme court at the apex.

In May 1922 the Procuracy was established as a state organ with the following features: (1) it was an instrument of the central power, in contrast to the courts, which were considered "local" agencies; (2) its function was to ensure the uniform interpretation of, and compliance with, standards of revolutionary legality laid down for the entire state; and (3) it was strongly centralized and removed from local and personal influences.[5] Thus, the initial ex-

[1] Lothar Schulz, *Russische Rechtsgeschichte* (History of Law in Russia), Lahr, Moritz Schauenburg, 1951, p. 209, ff.

[2] For a detailed account of the early development of Soviet judicial institutions, see John N. Hazard, *Settling Disputes in Soviet Society*, New York, Columbia Univ. Press, 1960.

[3] D. I. Kurski, *Izbrannie rechi i statii*, Moscow, 1948, pp. 65-66.

[4] *Ibid.*, p. 66.

[5] *Sorok let sovetskovo prava*, Leningrad, 1957, Vol. I, p. 584.

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periments in "socializing" the judicial system ended in total failure, producing as a necessary consequence a change of attitude towards a professional bar.

Simultaneously with the establishment of the Procuracy, a "Law Regarding the Bar" (*Polozheny o advokature*) was enacted in May 1922, providing for a structure and organization reminiscent of the old Tsarist bar. The personnel of the new bar consisted mostly of former "sworn attorneys-at-law," who henceforth were regarded as members of a free profession. They belonged to their own autonomous professional organizations—the so-called colleges of defense attorneys—governed by elected presidia which, as part of their functions, exercised disciplinary authority and passed on the admission of new candidates to the bar.

The colleges were subjected to some degree of supervision by the provincial executive committees, which were empowered to pass on their membership and to act as appellate bodies in case of complaints against decisions of the presidia. From 1922 to 1924, the colleges remained entirely independent of the courts, but in 1924 the appellate function of the executive committees was transferred to the provincial courts. Members of the colleges carried on what was primarily an "individual" (*i.e.*, private) practice conducted in their own offices with a measure of official support (*e.g.*, in the form of lower taxes and allotments of office space). Their fees were regulated by schedules fixed by the college presidia and approved by the provincial courts.[6]

Parallel with their private practice, members of the colleges were also required to provide so-called "legal consultation services" as a public duty. These services were organized by the college presidia and were performed mostly by young lawyers just beginning their careers. As the services were used mainly in charity cases, however, they did not compete with the lawyers' "individual practice."

As the situation then stood, members of the bar found a fairly broad field for the practice of their profession. They were almost without exception non-party members, as party members were forbidden to engage in private law practice. Even so, their earnings as independent lawyers were approximately twice or three times the salaries of judges and state attorneys.[7]

"Collectivization" of the Bar

The favorable situation of the professional bar did not last long. After the launching of the first Five-Year Plan, the regime was determined to press ahead with the building of a collectivized economy and to use the full power of the state to ensure fulfillment of the plan and eliminate any hindrances in the path of that objective. This meant the transformation of the organs of justice, particularly the courts and the state procuracy, into political instruments required to function not according to abstract truth and justice, but first of all on the basis of political expediency. What was politically expedient in the existing situation was decided, centrally, by the top leadership of the party and, locally, by the party apparatus. Within this apparatus was a special department for administrative organs which saw to it that judicial positions were filled by loyal party supporters.

This changed concept of the role of judicial administration led to a questioning of the existing form of criminal trial, with its dualism of prosecution and defense.[8] In reality, this questioning was aimed against the independent bar, and as part of the campaign a public discussion was organized in 1928 at the Theater of the Revolution in Moscow to deal with the question, "Is there really any need for a defense?" On this occasion, Soviet justice officials such as Yanson and Krylenko argued for the abolition of the colleges of defense attorneys on the ground that this institution was "inconsistent with the mission of Soviet justice and an impediment to socialist construction."[9]

The opposition, however, was not carried to the point of abolishing the colleges. It may be recalled that at this time there also was a move in favor of abolishing civil contracts on the ground that they were meaningless in relations between state-owned enterprises; but this idea was dropped when it was recognized that contracts and the operation of civil law could provide a valuable means of ensuring the fulfillment of the state's economic plans. Similarly, with respect to criminal trials, it was realized that a defense attorney could play a positive role as long as he carried out his function in court so as to serve the political objectives of the state.

To assure this subordination to state political goals, a reorganization of the professional bar

[6] D. S. Karev, *Sovetskoie sudostroistvo*, Moscow, 1951, pp. 162-63.

[7] As reported by A. Simionov, a former Soviet lawyer, whose manuscript notes are in the library of the Institute for the Study of the USSR in Munich.

[8] M. A. Cheltsov, *Sovetskii ugolovnyi protsess*, Moscow, 1951, p. 110.

[9] Simionov, *op. cit.*, p. 20.

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was begun in 1928 and largely completed by 1930. As in agriculture, the regime resorted to the most arbitrary methods in order to impose "collectivization" on the legal profession: independent lawyers were burdened with additional taxes, frequently denied office space, and subjected to other forms of harassment designed to force them to give up private practice. Legal defense activity was centered much more than before in the collectives of defense attorneys:[10] instead of receiving their power of attorney directly from the client, individual members were ordered by the collective to assume specific defense assignments and fees were paid to the collective instead of to the individual attorneys. About 50 percent of the income of the collective was distributed among its members as compensation, the remainder being allocated for other purposes.[11]

The collectivization of the bar did not, however, alter the thinking of professional lawyers or their approach to legal questions. They viewed the actions of the regime as a sort of terror which they could not and dared not resist lest they be completely disbarred from practicing their profession. This attitude of ill-concealed hostility on the part of many members of the defense attorneys' collectives, which included a substantial proportion of "old" (prerevolutionary) lawyers, did not escape the attention of the party authorities, and it is not surprising that between 1930 and 1939 many reputedly "anti-Soviet" lawyers fell victim to systematic purges.[12] At the same time, various concrete measures were taken with a view to developing a new generation of "true Soviet" lawyers.[13]

Many of the USSR's prominent judicial officials joined in the debate concerning the proper position and role of the Soviet lawyer. Among them, the late Andrei Vyshinski, Procurator-General under Stalin, must be regarded as the chief formulator of the professional lawyer's function in the Soviet system of justice. In his *Revolutsionaia zakonnost i zadachi sovetskoy advokatury* (Soviet Jurisprudence and the Tasks of Soviet Advocates), published in 1934, he called upon defense attorneys to bear in mind that what transpires in the courtroom is interlinked with the socio-political forces outside and itself develops into a definite political force. Specially noteworthy was Vyshinski's address to the Moscow Congress of Members of the Lawyer's Collegium in 1936,[14] in which he pointed to the great importance of the defense in court trials and the special character of the defense counsel's function in criminal cases. A court, he said, could not consider a case solely from the viewpoint of the prosecution. The prosecutor's function was to see that the law was obeyed; on the other hand, the defense counsel, though also obligated to uphold the law, had the basic function of assisting the accused—a role that was especially necessary in complex criminal cases. But, Vyshinski added, the function of the defense counsel was not simply to defend the accused, just as the prosecutor did not appear in court solely in support of the indictment: both were "parties" to the trial, and their common task was to clarify the facts of the case from all angles.

Thus, Vyshinski started from the premise that the state was interested solely in convicting the guilty. In his view, it was the task of the court to bring out the substantive truth in a trial. From this standpoint, the function of the defense was no less important than that of the prosecution: the defense attorney was considered, in effect, an "aide" to the court.

In August 1939, a new "Law Regarding the Bar (*Polozhennie ob advokature*) redefined the position of the colleges of attorneys. This law remained in force until July 25, 1962, when new regulations were promulgated for the RSFSR.[15] The new regulations, however, differed from those of 1939 only in details and did not alter the structure or duties of the colleges.

Each *oblast* has its own college of attorneys. Under the 1962 regulations, the colleges are authorized to provide legal assistance and representation not only to individual citizens but also to state enterprises and organizations. However, their main activity centers in legal assistance to the general public in the form of consultation (advice, information, explanations, etc.); preparation of petitions, complaints and other legal documents requested by citizens; defense of the accused in criminal trials; and representation of the ligitants in civil court actions.

The colleges provide these services through

[10] Karev, *op. cit.*, p. 163.
[11] Simionov, *op. cit.*, p. 27.
[12] Simionov, *op. cit.*, p. 24.
[13] Cheltsov, *op. cit.*, p. 109.

[14] See text in *Sotsialisticheskaia zakonnost*, No. 10 (1936) p. 9 ff.
[15] *Vedomosti Verkhovnovo Soveta RSFSR*, No. 29 (1962) Art. 450.

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legal consultation centers established at the seats of *raions* and in cities. A citizen in need of legal assistance applies to one of these centers, where he is assigned a lawyer upon payment of a fee fixed by schedule. In some cases, if the head of the center is agreeable, the client may have a particular lawyer assigned to him. The lawyers receive their compensation not from the clients but from the center. Their share is about 70 percent of the fees paid, the remaining 30 percent being retained for the needs of the center.[16] The colleges are regarded as "social organizations" and "voluntary" associations of persons engaged in legal work, and they serve in a sense as the lawyers' professional societies. Their organization, leadership, and activities are controlled by the executive committees of *oblast* soviets and ultimately by the appropriate organs of the union republics.[17]

Present Soviet regulations governing the bar stipulate that, in general, a person must have completed formal judicial training on the university level, plus two years of practical work in some branch of the judicial administration, in order to be admitted to practice as an attorney. The colleges of attorneys can, however, accept as candidates persons with the required legal training but without two years of practical experience; such persons must work as apprentices for at least six months before they can be admitted as full members of the college. Also, in exceptional cases, persons without university legal training can be admitted provided they have had at least five years of experience working in state judicial organs; however, their admission must have the concurrence of the *oblast* executive committee.

Until mid-1964 university training in law lasted five years, but the duration of the course has since been shortened to four and a half years. The curriculum prescribed by the Ministry of Higher Education for university law schools and institutes of law comprises, among others: foundations of Marxism-Leninism; political economy; dialectical and historical materialism; logic; Latin and foreign languages; political and legal theory; history of government and law; history of Soviet government and law; history of political science; foundations of Roman private law; and different branches of Soviet law such as constitutional law, administrative law, fiscal law, criminal law and criminology, etc.[18]

It is through the curriculum described above, supplemented by the required period of practical work experience in state judicial organs or as candidate members of an attorneys' college, that the regime has sought since the 1930's to develop a body of "true Soviet lawyers."

Stalinist Practices

After the failure of the initial experiment in "socialized" justice, the Soviet judicial system was organized within the framework of a state bureaucracy. The bar, it is true, formed a supposedly autonomous branch of the machinery of justice, but its members, in fact, exerted very little influence on the decisions of the courts in the 1930's. In contrast to the lack of qualifications on the part of many state prosecutors, and especially judges, the ranks of professional attorneys contained a high proportion of trained jurists; however, their superior training availed them little in view of the nihilistic Communist ideological conception of the law as a bourgeois institution.

The relegation of professional attorneys to the position of mere supernumeraries in the courts of Stalin's day may be ascribed to a number of factors:

(1) In this period the organs of justice were officially regarded as weapons to be used in waging the struggle against class enemies. As a consequence, a defense attorney could scarcely dare to oppose the specifications of an indictment lest he be suspected of defending a class enemy. Moreover, public prosecutors and judges were, almost without exception, party members, and even the people's assessors sitting as members of the court dared not oppose them. On the other hand, attorneys generally were not party members except for those who held executive positions in the attorneys' colleges.

(2) Cases involving political crimes were tried by regional courts or by military tribunals under special provisions (Chap. IV) of the Code of Criminal Procedure, which substantially limited the right of the accused to a defense. Also, only a small number of attorneys were authorized to act as defense counsels in political trials: according to A. Simionov, only 50 out of

[16] D. S. Karev, *Sowjetische Justiz* (Soviet Justice), Berlin (East), 1951, pp. 129-130.

[17] Ultimate control was formerly exercised by the Ministries of Justice of the union republics; today it is exercised either by the Councils of Ministers of the union republics or, as in the RSFSR, by the Law Commission of the Council of Ministers.

[18] For detailed information concerning the study of law in the USSR, see report by Rainer Lucas in *Juristenzeitung* (West Germany), No. 1, 1962, pp. 21-23. Lucas studied law at the University of Moscow during 1961-1962.

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a total of approximately 1,500 attorneys in Moscow had such authorization.[19] When they did appear in political trials, moreover, they were expected to give evidence of their loyalty to the Bolshevik regime, often with the result that, instead of defending the accused, they joined the prosecution in heaping accusations on him.

(3) The public prosecutor's office, which was fully subservient to the organs of state security, enjoyed a complete monopoly of the pretrial investigation of cases, neither the defense nor the court being allowed access to the proceedings at this stage. After the pretrial investigation was complete, the case was referred to the court for a so-called "preparatory hearing" (*podgotovitelnoie zasedanie*). Until the mid-1920's, there was a conflict of views as to whether the transfer of a case to the court (*predanie sudu*) was a function of the court itself or of the prosecutor. The theoreticians of the Stalinist era argued that to assign this power to the court would imply a lack of confidence in the prosecution, and that the court would then be duplicating the function of the prosecution in controlling the work of the investigative agencies. This viewpoint was upheld by a resolution of the All-Russian Central Executive Committee and of the RSFSR Council of People's Commissars, dated October 20, 1929.[20] From that time on, for all practical purposes, cases were decided at the preliminary stage, without the participation of the accused or his defense counsel, and the main trial proceedings in court became largely a formal show for the purpose of influencing the masses.

(4) At the "preparatory hearing," it was also up to the court to decide whether to hold the formal trial with or without the participation of prosecution and defense. If it adopted the latter course, the court in effect assumed the role of prosecutor, deciding at the preparatory hearing how the case would be disposed of. In so doing, the court proceeded from the presumption not of the accused's innocence, but of his guilt, because the prosecution—representing the overriding authority of the state—had already found the accused person guilty in its indictment.

(5) Not least important was Vyshinski's theory which defined "substantive truth" as the highest degree of probability. A mere confession by the accused was enough to convict him and bring about his punishment. This theory was designed to serve the political purposes of the "class struggle," and its practical effect was to make it more difficult for a defense attorney to prove the innocence of his client.

Functions of the Defense Attorney

Even before Stalin's death the position of the attorney in the judicial process became the subject of fresh controversy among Soviet legal scholars. As mentioned earlier, the official doctrine, as formulated by Vyshinski in the 1930's, held that the attorney for the defense was an "aide" to the court. Professor Mikhail A. Cheltsov, of Moscow University, still upheld this doctrine as late as 1951, arguing that the law recognized the participation of defense counsel in trial proceedings as fundamentally necessary to assist the court in achieving a more complete clarification of the case under trial.[21] On the other hand, a different view was put forward by another leading Soviet jurist, Professor Mikhail S. Strogovich, also of Moscow University. In an article published in 1948,[22] Strogovich sought to base the position of the defense attorney on his relationship, not to the court, but to his client, the accused. He has consistently adhered to this view ever since.

While conceding that a defense attorney does serve as an aide of the court in the sense that, in defending his client, he helps the court to achieve its function of rendering justice, Strogovich contended that this circumstance was not the key to the essential function of the defense counsel, which was to protect the legal rights of the accused. If the defense counsel was an aide of the court, he asked, why should he be paid by his client instead of by the court? He argued further that it was entirely up to the accused, and not to the court, to decide who his defense attorney would be. The accused might even choose to dispense with defense counsel, which would mean that he could deprive the court of its supposed "aide." [23] Strogovich did not, however, construe the legal relationship between a defense counsel and his client as excluding the interests of the state; rather, he emphasized this relationship in order to refute the hitherto accepted interpretation which ignored it.

[19] Simionov, *op. cit.*, p. 37.
[20] *Sobranie uzakonenii RSFSR*, No. 78 (1929) Art. 756.
[21] Cheltsov, *op. cit.*, p. 115.
[22] M. S. Strogovich, "Protsessualnoie polozhenie zashchitnika v sovetskom ugolovnom protsess," in the compilation *Zashchita po ugolovnym delam*, Moscow, 1948.
[23] M. S. Strogovich, "Protsessualnoie polozhenie advokata v sovetskom ugolovnom protsesse," in *Sotsialisticheskaia zakonnost*, No. 3 (1959).

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Basically, the position of the defense counsel in criminal trials is very closely related to the position of the courts in the overall structure of the state. The position of the courts, in turn, is directly related to the fundamental principles on which the state is founded—that is, to the basic concepts of law, justice, and the relationship between state and citizen. The history of Soviet justice has amply borne this out. During the period when Soviet judicial policy was shaped by Stalin's thesis of an intensification of the class struggle parallel with the approach to socialism, the official attitude towards the bar became more negative to the same extent that the courts themselves became instruments for the liquidation of class enemies.

Following Stalin's death, and especially after the 20th Party Congress condemned the thesis of sharpening class struggle, certain modifications of the hitherto prevailing judicial doctrine became necessary. Although Cheltsov still held in 1954 that the function of a defense counsel was to render active assistance to the court in arriving at a correct assessment of the truth concerning an alleged crime and a clarification of the danger presented to society by that crime and its author,[24] members of the Leningrad college of attorneys publicly protested against this formulation in 1955 on the ground that what Cheltsov had defined as the function of the defense attorney was actually that of the prosecutor and the court. The attorney's first and foremost task, they maintained, was to defend the legal rights and interests of the accused citizen; and by so doing he helped the Soviet state and Soviet justice and fortified "socialist legality."[25]

Although these polemics might suggest that a significant change has taken place in the theoretical view of the defense attorney's role, in the author's estimation this would be an exaggeration. Cheltsov continues to maintain that the defense attorney is an organ of the state administration of justice, but that this does not preclude the special character of his function. As already mentioned, Strogovich on the other hand bases the position of the defense counsel on the legal relationship between him and his client; but while placing major emphasis on this relationship, he is nevertheless constrained by the facts of Soviet totalitarianism to recognize that the defense counsel does function as an organ of the judicial administration. Strogovich, indeed, emphasizes that the defense counsel is the champion of the *lawful* interests of the accused—that is, his interests as recognized by Soviet law. Taking into account the special role of law as defined by Soviet political doctrine and jurisprudence, it follows that there is no essential difference between the two interpretations. The two proceduralists both move about within the closed room of Soviet jurisprudence and are unable to introduce any new element.

Nevertheless, the post-Stalin period has seen many important changes in Soviet practice which have affected the position of the legal profession. The most significant are as follows:

(1) The state security service, which in Stalin's time played an important part in judicial administration, has been separated from this function.

(2) The content of "socialist legality" has altered to require that all parties to a trial be held to strict compliance with existing laws. The function of the law as a positive instrument of "socialist construction" has been tremendously enhanced: if a law becomes obsolete or fails to meet the requirements of Soviet life, it must nevertheless be obeyed until it is formally repealed. Especially in the field of criminal law and criminal procedure, the relevant norms have become more abstract—*i.e.*, more free from any form of subjectivism.

(3) The courts have emancipated themselves from the influence of the state procuracy. Although the prosecutor still fulfills the dual function of appearing in court as the accuser and exercising supervision over compliance with the law, he no longer has at his disposal any weapon other than lodging a protest against the court's decision.

(4) Whereas the academic preparation of judges in the Stalin era—especially the 1930's—was generally deficient, Soviet judges today have the necessary professional training to enable them to hand down objective decisions. Since prosecutors and defense attorneys also possess the same professional qualifications, court trials take on the character of forensic contests over the law, bearing at least a formal resemblance, insofar as the relations between the trial participants are concerned, to criminal proceedings in continental European courts.

(5) Trial courts of primary jurisdiction are composed of a professional judge and two people's assessors. The latter are somewhat analogous to jurors in that they participate as representatives of the public. (They are popularly elected to lists of assessors, from which they are

[24] In the compilation, *Advokat v sovetskom ugolovnom protsesse*, Moscow, 1954, p. 17.

[25] A review of the compilation *Advokat v sovetskom ugolovnom protsesse*, in *Sovetskoie gosudarstvo i pravo*, No. 3 (1955) pp. 140-143.

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successively drawn to serve on the court for a 10-day period each year.) In performing their temporary judicial function, the assessors are expected to be guided by the law and their socialist consciousness, and not to act as spokesmen of a politically undifferentiated society (which does not exist in the USSR). This means that they are influenced directly by the authority of the professional judge, who briefs them on juridical matters, and indirectly also by that of the prosecutor—all of which seriously handicaps the defending attorney.

Since, however, the prevailing doctrine holds that only guilt shall be punished and that it is up to the court to determine the degree of guilt as a measure of the penalty to be imposed, it becomes the duty of the defense counsel to present all facts and circumstances favorable to his client—provided that, in so doing, he does not compromise the allegiance he owes to the ruling ideology and the state. It is not easy to say precisely how far an attorney can go in defending an accused without opening his own political loyalty to question. If he contests the specifications of the indictment, he puts himself in opposition to the prosecutor, who is both a state official and a party member; if he appeals the conviction of his client, he challenges the correctness of the decision of the court, which is a state agency. These concerns obviously impose restraints upon his freedom of action in conducting the defense of his client.

Official Views

There is little question, however, that the post-Stalin period has seen the emergence of a more positive official attitude toward the Soviet bar. The acceptance at long last of professional attorneys as *personae gratae* in Soviet judicial and public life was evidenced in 1957 by the following passage in a speech delivered by I. A. Kairov, an important party official, before the USSR Supreme Soviet:

Soviet attorneys, by providing legal assistance to the people, fulfill . . . the important task of strengthening socialist legality and the administration of justice. . . . Here and there the alien [stranoie] *attitude still persists that attorneys are a disruptive element and do not contribute towards effective judicial administration. Such an attitude towards attorneys is wholly at variance with the real tasks of Soviet justice. We must put an end to it and look upon the attorney as a true, inflexible, and courageous defender of truth and justice.*[26]

More important, in response to demands voiced in various professional law journals, Article 22 of the Fundamentals of Criminal Procedure, adopted in 1958, stipulated that the defense attorney should be allowed to participate in a case involving his client by the time the investigative stage came to an end. (This was a compromise solution inasmuch as liberal jurists had wanted defense counsel to be admitted during the entire period of the preliminary investigation, while the Procuracy wanted to exclude them altogether.) In addition, the new Criminal Code and Code of Criminal Procedure did away with certain restrictions on the rights of the accused and rectified Vyshinski's harmful theories with respect to evidence and "substantive truth."

There are other indications of the increased official confidence placed in the legal profession as an established cog in the machinery of Soviet justice. Books compiled by professional attorneys to serve as guides to the conduct of defense activities in court have been published with official imprimatur.[27] Members of the professional bar have been encouraged to take an active part in campaigns designed to bolster the authority of the law in the eyes of the general public through lectures, educational programs, etc. A resolution adopted by the CPSU Central Committee in 1964 called for the participation of both academic and "practicing" jurists, including professional attorneys, in devising measures "to promote the growth of legal science and improve legal training" throughout the USSR.[28]

All this does not mean, however, that the Soviet regime is satisfied that it has fully accomplished its objective of building up a cadre of "true Soviet lawyers." In fact, Soviet legal journals [29] and the press continue to publish articles critical of the bar, mainly on the ground that attorneys concentrate too much on vindicating their clients in court and fail to honor their higher responsibility to the state and socialist society. Especially noteworthy was an article published last year by I. Kukarskii, deputy chairman of the Law Commission of the

[26] *Zasedanie Verkhovnovo Soveta SSR, chetvertovo sozyva (shestia sessia) stenograficheskii otchot*, Moscow, 1957, p. 464.

[27] *E. g.*, A. M. Levin, P. A. Ognev, and V. L. Rossels, *Zashchitnik v sovetskom sude*, Moscow, 1960; also *Sudebnie rechi sovetskikh advokatov; sostavili sbornik M. M. Vyria, Ya. S. Kiselev, G. M. Shafir*, Moscow, 1960.

[28] The full text of the resolution was not published, but commentaries on it may be found in *Sovetskoie gosudarstvo i pravo*, No. 8 (1964), pp. 3-13; *Sovetskaia yustitsia*, No. 18 (1964), editorial.

[29] Especially *Sovetskaia yustitsia* and *Sotsialisticheskaia zakonnost*.

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RSFSR Council of Ministers (the official organ charged with supervision of the bar in the RSFSR).[30] The article contained a good number of criticisms, which may be summarized as follows:

(1) In defending their clients, attorneys sometimes resort to impermissible methods detrimental to the interests of "society" and the state. They contact witnesses for the purpose of influencing them in favor of the accused, and in court they attempt to distort the evidence assembled by the investigative agencies. Also, in some instances, they file unfounded motions motivated exclusively by the interests of their clients. When the pretrial investigation of a case has been concluded, the defense counsel is permitted to study the evidence against the accused and to file a motion for additional investigation if he finds the evidence deficient; however, for tactical reasons, he may delay filing such a motion until the formal trial is already in progress, hoping that if the motion is then allowed by the court, this will discredit the work of the prosecutor and the investigative agencies.

(2) Attorneys are sometimes guilty of accepting illegal "private" stipends paid directly to them by their clients in addition to the compensation they get from the attorneys' college.

(3) Many attorneys shirk their duty to participate in public education activities, either evading giving lectures or giving perfunctory talks of little value.

(4) The attorneys' colleges fail to exercise adequate supervision over the activities of their members and to cooperate actively enough in combating crime. They often neglect to send an observer to the court when a member attorney is pleading a case and consequently are unable to hold group critiques of the manner in which the attorney conducted the defense. The presidium of each college, composed mostly of party members, is supposed to exercise broad control over the activities of its members in trial proceedings and to take disciplinary or censorial action in cases of improper conduct.

Kukarskii's article went on to indicate that official steps would be taken to remedy these abuses. In particular, new regulations concerning legal fees would be put into effect with a view to stopping the payment of "private" stipends. Also, the Law Commission of the RSFSR Council of Ministers was to tighten its supervision over the attorneys' colleges, which in turn would be obliged to exercise closer control over the activities of their members. All this points to the conclusion that the regime's objective is to assure that the attorneys' colleges develop into "socially-oriented" organizations similar in nature to the Soviet labor unions.

The Social Position of Lawyers

The number of students enrolled in university law courses and institutes of law in the Soviet Union is largely fixed by government plan. Up to now there has been little official interest in encouraging the study of law, and for this reason scholarship stipends paid to law students have been lower than those paid to students of the natural sciences.[31]

Since the 1930's, the USSR has had a statutory requirement that students who receive higher education at state expense must, upon completing it, accept work assigned to them by the government for a period of three years.[32] Law graduates are subject to this rule, which means in practice that they will be assigned to work for the required three years either in a court, a public prosecutor's office, or the legal department of a state enterprise. Only upon termination of this period can these young lawyers decide whether to continue their work in state judicial agencies or take up a career as professional attorneys. Most of them opt to go on working for the state—as prosecuting attorneys, in the investigative agencies, or in the courts. Those who choose a career as professional attorneys are usually either idealists who consider this to be their natural calling, or the untalented who have not been able to make their way in the state judicial administration or with state enterprises.

In the eyes of rank-and-file Soviet citizens, members of the bar occupy a position of great prestige and respect. The reason for this is simply that it is to the professional attorney that the individual citizen accused of violating the law must look for the protection of his rights and interests against the overwhelming power of the state. While official doctrine enjoins attorneys not to place their obligation to a client above their duty to the state and socialist society, this has not deterred them from acting in accord with the humanitarian dictates of conscience and exerting themselves to the utmost on behalf of those they defend.

The attitude of Soviet attorneys with respect to the observance of professional secrecy illustrates the point. In most democratic countries,

[30] *Sovetskaia yustitsia*, No. 18 (1964), pp. 7-9.

[31] See article by Rainer Lucas, *loc. cit.*

[32] For relevant ordinances, see *Sbornik zakonodatelnykh aktov o trude*, Moscow, 1956, pp. 45-46.

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lawyers are legally entitled to refuse to disclose any information confidentially communicated to them by their clients. The criminal code of the (West) German Federal Republic even makes it a punishable offense for the defense counsel in a criminal case to divulge "without authorization . . . private secrets confided to him by reason of his function" (Sec. 300). Soviet law and criminal procedure, on the contrary, do not recognize any right of "confidential communition" between an attorney and his client: like all other citizens of the USSR, attorneys have the formal duty to cooperate with the state judicial organs in combating criminality.[33] In fact, however, most attorneys choose to close their eyes to this duty rather than act in such a way as to undermine the confidential relationship between themselves and their clients.

This situation has prompted Soviet journals to lecture to members of the bar on the difference between the Western and Soviet concepts of professional ethics for attorneys. Whereas the bourgeois lawyer's ethic sanctions the "right to lie" on behalf of a criminal, one article asserted, "socialist morality" demands that the attorney exclusively serve the cause of truth.[34] From time to time, the Soviet press has also carried reports of alleged "anti-moral" conduct on the part of members of the legal profession. The publicity given to such cases is evidently aimed at forcing attorneys into a more compliant role as tools of socialist justice.

There has been a natural tendency for professional lawyers in the Soviet Union to gravitate to the principal urban centers of the country, where the opportunites for earning a livelihood in private legal practice are greatest. As a result, in the RSFSR—which has a total of only 7,000 attorneys to serve a population of 125 millions—there are 103 *raions* without a single attorney, compelling residents of these districts, when in need of legal assistance, to travel to the nearest—but often very distant—regional center having an attorneys' college. In the Kuibyshev region, there are 152 attorneys in all, 100 of them concentrated in the city of Kuibyshev itself. In the Smolensk region, there are but 34 attorneys divided among the larger cities, with only six more to be found in the remaining eight cities and *raions* of the region. This suggests that attorneys in the USSR are allowed a fairly large degree of freedom in choosing where to practice their profession. A decisive factor in their choice, apparently, is whether or not they have good "connections" among the administrative officials of a particular attorneys' college, as a good deal of "cliquishness" seems to exist in these bodies.[35]

Until fairly recently, the work of Soviet professional attorneys was largely confined to criminal cases, employment disputes, and housing litigations, and their opportunities for making money were relatively limited. However, the last few years have seen a marked increase in the scope of legal activity, especially in the area of relations between state economic enterprises and collectives (kolkhozes), with the result that these organizations now find themselves increasingly in need of the services of trained attorneys. In some cases, attorneys have reportedly performed such services on an "honorary" basis—*i.e.*, without remuneration [36] —but according to a statement by G. I. Sukharev, deputy chief of the Department for Administrative Organs of the party Central Committee for the RSFSR, where attorneys have been pressured into rendering "honorary" legal services to state or collective organizations, they have generally performed them in a careless and perfunctory manner. However, it now seems to have become fairly common practice for enterprises and other organizations to retain attorneys to handle their legal affairs on a contractual basis, paying them handsome retainer fees. One attorney in Kuibyshev was reported to have contracted out his services to four different enterprises, and another, who was retained under contract with an association for the hard-of-hearing, reportedly collected fees for a period of several years without having to handle any legal business whatever.[37]

Thus far, the presidia of the attorneys' colleges, the executive committees of the local soviets, and even the local party committees appear to have shown relatively little interest in enforcing more rigorous standards of discipline among members of the professional bar. However, recent articles in leading legal journals suggest that the party is now giving much thought to this problem. There have even been proposals for the establishment of a fixed income for attorneys with a view to curbing their aspirations to personal prosperity.[38] This will certainly not be an easy task.

[33] *Advokat v sovetskom ugolovnom protsesse*, p. 66.
[34] *Sotsialisticheskaia zakonnost*, No. 22, 1964, p. 13 ff.
[35] *Sovetskoe gosudarstvo i pravo*, No. 10, 1964, pp. 4, 7, 42.
[36] *Sovetskaia yustitsiia*, No. 22, 1963, p. 23.
[37] All these facts have been drawn from *Sovetskoie gosudarstvo i pravo*, No. 10, 1964, pp. 11-12.
[38] *Sotsialisticheskaia zakonnost*, No. 11, 1964, p. 50.

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Hosts and Pests:
The Fight against Parasites

By Leon Lipson

Like many other countries, the Soviet Union has people of varied habits, tastes, morals, and ways of life. Unlike many other rulers, Soviet leaders find this diversity repugnant. To their mind, the team must pull together, and no one must be allowed to pull the wrong way. When some players act as if they did not even know they were on a team and pulling, they are suspect: Could they, in stealth, be playing on another?

The metaphor of the team is but a metaphor. It exaggerates the definiteness of the rules to which the team adheres, and it understates the size of the stakes in a contest that the managers take in dead earnest. Yet it will profit us to follow the metaphor a little further still.

The managers of Soviet society believe that society, like a team, is no mere aggregation or even congregation but an organism aimed at a goal. It is the managers who define the goal and aim the organism. As in a game, the goal can be reached only by defeating the opponents who (though doomed to defeat) are assumed to be well organized, persevering, and equipped with tools and strategy.

The players count for less than the managers, but they need to be looked after. From time to time they need rest, reward, and refreshment. From time to time they need exhortation and morale-boosting; at all times they need strong and confident leadership. The health of the team demands vigilant attention; certain players must be relied on to observe and report on the rest. When a player falters or is faint of heart, he must be sent to the sidelines lest he corrupt his teammates. Weakness, illness, and betrayal differ more in origin than in effect, and the response must be uniformly decisive. Occasional exemplary punishment acts as a stimulus to the others.

Not all of the objectives pursued by the Soviet leaders can be fitted readily into the team-metaphor. Coercion to virtue is esteemed not only for virtue's sake but also as a means of reducing the incidence of lawbreaking. The

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number of violations of public order is swollen by the difficulties of the society and by the broadly inclusive notion of what *amounts* to a violation. The more precarious the equilibrium of the state, the greater the perceived danger of subversion; the narrower the line, the harder it is not to deviate from it. Even short of disorder, subversion, and deviation, the failure to do one's part in raising the wealth of the state is an offence against the presuppositions of the leaders and thus against the laws of the realm. If *homo oeconomicus* is not yet respectable enough to be allowed on the stage, let his lines be given to *homo juridicus:* Soviet morality permits the government to threaten pain in order to push the citizen to many acts to which it cannot yet pull him by hope of reward.

Under Khrushchev's rule the Soviet state apparatus lightened its grasp a little. Much has already been written about the reduction of penalties for some crimes, the abolition of certain forms of criminal liability side by side with the hardening of repression in other fields. Observers of the Soviet scene have described the decline in (not the elimination of) the power and conspicuousness of the internal security police, as well as the partial reform of the procedure of investigating and prosecuting crimes.

What has thus far received insufficient attention in the West has been another mode of control that has spread widely over the Soviet Union, covering a wide variety of criminal acts, anti-social behavior, unorthodox views and "un-Soviet" attitudes. The institutions through which the control is exercised, though tied closely to the State, lack a full-time paid professional staff, formal procedural rules, and bureaucratic traditions; indeed, that is counted to their credit. These institutions may be described as the non-courts (in the first place, the comrades' courts and the anti-parasite tribunals) and the im-police (the DND, or volunteer people's guard). The importance of these "civic" organizations for the Soviet administration of justice is equalled by the place they have come to occupy in Soviet constitutional theory: the non-courts are the foremost installments by which Khrushchev made partial delivery on his promise, or threat, to transfer more and more functions of government from the State to the people. Soviet jurists seldom choose to illustrate this process with the anti-parasite tribunals, which sometimes seem as awkwardly marginal in Soviet theory, and almost as awkwardly prominent in Soviet practice, as the death penalty.[1]

The Party Leads the Way

The anti-parasite laws began their modern career before the revival and reformation of the comrades' courts and the volunteer people's guard. Draft statutes appeared in party newspapers through the Union in early 1957. Under those drafts, "able-bodied citizens leading an anti-social, parasitic way of life, deliberately avoiding socially useful labor, and likewise those living on unearned income" could be tried at a public meeting of fellow-residents. In cities, the meeting would be convoked by a street committee or apartment house management's committee for cooperation in maintaining public order; in rural areas, by a village Soviet. Sentence could be passed by a majority of those attending, who in turn had only to be a majority of the adult citizens of the given local unit. Although the meeting could confine its action to a warning for a period of probation, the primary sanction was exile at forced labor for two to five years.[2] The sentence would be subject to no judicial review, but would go into effect on being confirmed by the executive committee of the local Soviet.

The drafts met opposition, some of which was made public in articles and letters to the newspapers. A number of people asserted that the definition of living on unearned income was vague; that sham-workers should be included beside non-workers; that the requirements for a quorum at the public meeting should be tightened. Someone urged that the government prosecutor (*prokuror*) should be present at the trials to watch over legality; it was suggested that the power of the general meeting should be limited to the uncovering of facts to be brought to the attention of the *prokuror* for further action in the course of regular criminal prosecution; others urged that the public meeting be

[1] For example, one of the most thorough Soviet treatments of the role of the public in the preservation of public order is Korotkov & Shind, *Obshchestvennost v borbe s narusheniiami sotsialisticheskoi zakonnosti*, Moscow, 1962. A chapter is devoted to the volunteer people's guards, another to the comrades' courts, and thirty pages more to the participation of workers in law enforcement; yet there is no mention of the parasite laws, though the monograph was not completed till months after the RSFSR anti-parasite law had been enacted.

[2] Professor R. Maurach has called attention to a precedent in a decree enacted by the Presidium of the Supreme Soviet of the USSR in late 1956, "in accordance with which nomadic gypsies who resisted settlement could be threatened with administratively imposed exile for up to five years, with penal labor." Maurach, "Die Einschaltung der sowjetischen Offentlichkeit in die Rechtspflege," *Moderne Welt*, (Seattle, Washington) Heft 2, 1961/62, p. 192.

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vested with a wider range of possible sanctions than the choice between a warning and two-to-five-year exile.

The anti-parasite measures were nonetheless enacted, mostly in a form close to the drafts, in nine "outlying" republics between 1957 and 1960. In the Russian Republic and the Ukraine, no anti-parasite law was enacted until 1961; opposition there may have been even stronger though less visible.

There is reason to think that between 1957 and 1961 the opponents of an anti-parasite law sought to play off one non-court against another. The draft statute for the comrades' courts in the Russian Republic, published in 1959, included a provision that would have let a comrades' court hear parasite cases. As the sanctions available to the comrades' courts did not include anything so drastic as exile to forced labor for two to five years, the suggestion to bestow parasite jurisdiction on comrades' courts may have come from those who thereby desired to forestall the adoption of an anti-parasite law.[3]

In late 1959 and 1960 the drive for more drastic punishment of parasites in the Russian Republic was renewed. A lead seems to have been taken by officials of the Young Communist League (*Komsomol*), whose institutional connection with the internal security apparatus has long been apparent. First, the Komsomol has administrative responsibility for many of the "welfare" activities aimed at combating the rise of juvenile delinquency.[4] Second, it has special duties in organizing and controlling public demonstrations, both the carefully planned official demonstrations and the more carefully planned "spontaneous" demonstrations. Third, the Komsomol has played an active role in the establishment and staffing of local volunteer people's guards (*druzhiny*) and the units that the guards superseded.[5] Fourth, the Komsomol, in its public pronouncements, has tended to uphold a stern, xenophobic, and maximalist standard on questions of ideological purity and public morality. Fifth, the leaders of the organization appear to form a pool from which the senior Soviet security apparatus draws its staff.[6]

In early 1960 the Komsomol Central Committee urged its local organs to work with and reform young ex-convicts and idlers, to help comrades' courts, to fight drunkenness, to help parents in the upbringing of children.[7] In April a Komsomol newspaper objected to a prosecutor's leniency in remitting to the custody of her father a pampered girl who with her husband had taken to theft.[8] Later the tone grew harsher. In August, in a pair of articles on a young drifter whose main offenses seemed to be that he could not hold down a job and that he aped foreign ways, the newspaper's correspondents complained that others like him could

[3] If the 1959 draft had provided for comrades' courts not only to hear cases of parasitism but also to impose two to five years in exile at forced labor, the interpretation put forward in the text above would be unlikely: there would have been little point in opposing the establishment of public meetings if comrades' courts could do the same work in the same way. In Berman and Spindler, "Soviet Comrades' Courts," *Washington Law Review* (Köln-Marienburg, Germany), Vol. 38, pp. 842, 872 (1963), the authors attribute to the 1959 draft a provision giving the comrades' courts power not only to try parasites but also to sentence them "to 'resettlement' for two to five years." The draft does not say that. The sanctions for avoiding socially useful work and leading an antisocial parasitic mode of life would have been restricted to the general and much milder penalties made available to the comrades' court under Article 15 of the draft. What supports the conjecture that the opponents of an anti-parasite law sought to forestall its adoption by using the comrades' court draft is the very fact that the offense was included but not the sanction.

[4] In several criminal trials of adolescent offenders that this author saw in (regular) people's courts in Moscow in 1963, the judges seemed to look on the Komsomol as serving two important, but perhaps conflicting, purposes. Membership in the Komsomol, they said, was the summit of youth's proper ambition; the Komsomol selected the best of the best from applicants who were required to prove themselves worthy. At the same time, they regarded the Komsomol as a training organ for potential delinquents who should be kept out of mischief and turned to socially desirable activity. The duality can be reconciled, at some cost, by the contention that the Komsomol looks on the high-spirited footloose youth at that critical moment when he may be turned by society's influence onto the path of delinquency or onto that of constructive effort and even leadership; but it is more reasonable, I think, to accept the two ideas as coexisting in unresolved ambiguity. More than one strain of political and social planning goes into the Young Communist League.

[5] See Dennis M. O'Connor, "Soviet People's Guards: An Experiment with Civic Police," *NYU Law Review*, New York, Vol. 39, pp. 579, 585-86 and 589-90 (1964).

[6] The Komsomol seems to have been either the training ground, or the base of power, or both, for the rise of such figures as A. N. Shelepin and V. Ye. Semichastny. Each of them was First Secretary of the Komsomol before his rise in the larger apparatus of the KGB and the Party.

[7] "On Increasing the Role of Young Communist League Organizations in the Fight Against Violations of Public Order," Decree of the 7th plenary session of the Central Committee of the Young Communist League, *Komsomolskaia pravda* (henceforth referred to as *KP*), Moscow, February 5, 1960: ". . . It is important that not one antisocial act by a young person remain unnoticed by the collective. No time is too precious to devote to someone in distress; he must be given special attention and helped to understand his mistakes, and these mistakes must not be allowed to develop and take root."

[8] A. Khodanov, "On Papa's Neck," *KP*, April 19, 1960.

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sin undeterred because they knew that he was not threatened "with even 15 days, much less 15 years, for his parasitism." They asserted that comrades' courts had no jurisdiction because "these people have no comrades," and they recommended that "the people's volunteers, who know these idlers well, should be granted the right to try them and hand down stern sentences in the name of Society, the right to turn them out of the Peking Restaurant [in Moscow] and send them to construction sites and logging camps, to make them work." [9] Letters from readers upheld these suggestions, recommending with vigor that "loafers like these should be expelled from big cities and settled in special colonies"; that "hooligans, drunkards, and all other loafers must be categorically barred from living in the big cities," especially Moscow; that "these 'heroes' must be sent to special correction colonies to be taught respect for labor." [10]

Other Soviet papers paid their respects to parasitism in the same period but tended to fit their accounts more closely to a particular offense which was, or in the writers' view ought to have been, made a regular crime.[11]

Important, though still general, guidance came in September 1960, through a leading article in the official party theoretical organ *Kommunist*.[12] The writers of this article acknowledged that "the struggle against parasites is being intensified at the present time"; attributed the persistence of parasitism to private-property psychology, which was nourished by contemporary influences from the bourgeois world; recommended stricter enforcement of existing laws and less emphasis in the press on speculators' ill-gotten gains; and ominously concluded with a word of praise for the anti-parasite law passed shortly before in Georgia and a call for new legislation making it possible to bring "administrative or criminal proceedings" against all parasites.

Comments and Response

Jurists moved into the discussion in the latter part of 1960. Two of them agreed that new penalties on parasites had to be set, but they advocated the use of sanctions adjusted to the offense. Thus, said one, it might be possible to deprive parasites of a right to state housing, to rescind permits on land used for rental speculation, to take licenses away from drivers who used their cars for illegal transport at a profit, to deny parasites admission to health resorts, to exclude them from medical facilities except in dire need, to keep them out of educational institutions and libraries.[13] The other expressed himself against the withholding of medical care and access to libraries, but he favored settlement in special corrective-labor colonies; condemnation as a parasite, he held, ought to be pronounced either by a comrades' court or by a public meeting.[14]

Shortly thereafter a people's judge voiced two recommendations which found their way into an RSFSR decree six months later: one, that property acquired by means other than labor be forfeit; the other, that parasites should be not simply banished from the city where they happened to be offending but settled in definite areas and compelled to work there, on pain of criminal punishment.[15]

[9] A. Sukontsev & I. Shatunovski, "Frank Soldatkin, Local Alien," *KP*, August 11, 1960. His name, we are told, was Vladimir Soldatkin, but he liked to go by the alias of Frank Disney (cf. note 29 below). His thoughts were bent on a life of luxury with big cars, villas, and fancy restaurants. He spent months lolling on the couch looking at pictures in foreign magazines. While loafing he picked up broadcasts of foreign jazz, "and while he was about it the raving transmissions of the Voice of America." Later still, he had spent a half year strolling on Gorky Street in Moscow, pestering tourists.

[10] "Make It Hot for the Loafers!—Unanimous Opinion of Our Readers," *KP*, August 25, 1960.

[11] See, *e.g.*, "The Collapse of Pavlov & Co.," *Sovetskaia kultura*, Moscow, January 12, 1960 (speculators in manufacture and sale of jazz records on X-ray film); "People with Outstretched Hands," *Literaturnaia gazeta*, Moscow, March 12, 1960 (spurious beggars); "The Road Home," *Izvestia*, March 20, 1960 (girl led a parasite life, became an accomplice in petty theft, was sentenced to seven years at a corrective labor colony and writes her father hoping that her reformed attitude will justify release); "Foreign Label," *Izvestia*, March 11, 1960 (young *stiliagi* in Archangel called themselves by foreign names, trafficked in foreign goods bought from sailors, resold foreign clothes); "From the Courtroom; Caveman from the Old World," *Sovetskaia Kirgizia*, May 27, 1960 (parasite speculated in religious articles sold to an Adventist community; sentenced to six years of confinement); "Crown Princes," *Ogoniok*, Moscow, July 1960 (parasite speculated in foreign clothing, dissipated illegal profits in restaurants, but came to grief by dodging induction into the army). The *motif* of youths buying foreign goods from foreign sailors appears again in Novorossiisk; see "They Are Disgracing Our City," *KP*, September 17, 1960.

[12] "He Who Does Not Work, Neither Shall He Eat," *Kommunist*, Moscow, No. 14, September 1960, pp. 13-21.

[13] Yu. Todorski, "Let the Law Have Its Say!" *KP*, September 9, 1960.

[14] G. Grigorian, "Here Is A Source of Crime!" *KP*, September 17, 1960.

[15] M. Babaiev, "Notes of a People's Judge: 'Proprietary' or Improper?" *KP*, October 29, 1960. He made another suggestion, not reflected in the 1961 decree, that administrative and criminal liability should be established for those who pampered, supported, or corrupted a parasite.

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О ПОЛЬЗЕ ЛЕКЦИЙ Рисунок А. ЦВЕТКОВА

YOUTH AND HOOLIGANISM

Wall sign: Today—Lecture on the Moral Physiognomy of the Young Man.
Below: On the Utility of a Lecture.

—*From* Krokodil *(Moscow), November 20, 1963.*

It was just this element of forced labor that troubled other jurists. A leading article in the journal of the RSFSR Ministry of Justice and Supreme Court, preferring the denial of various social benefits, objected:

. . . it is hardly possible to accept as correct the assertions of some readers who propose that parasites should be forced to work by administrative bodies, inasmuch as forced labor, widely resorted to under capitalism, is alien to socialism.[16]

The article did, however, agree with the adoption whenever necessary of the hearing procedure familiar from the existing antiparasite laws: sentence by public meeting, and confirmation by the local Soviet executive committee.

The year 1961 was marked by the campaign against economic crimes and the expansion of the death penalty;[17] it is not surprising that during that year public opposition to the stiffer form of anti-parasite law came to a halt. On May 4, 1961 the RSFSR at last enacted its decree, to which in the following months the legislation of almost all other union republics was substantially conformed.[18] The opponents of anti-parasite legislation had lost. Comrades' courts, with their lighter sanctions, were not given authority over parasite cases as such; the new legislation retained the sentence of two to five years of exile to specially set-off regions, with compulsory labor at the place of settlement.

Opposition, however, had not proved altogether vain. The 1961 decree did contain one important change from the 1957 drafts, and thus also represented a departure from the legislation of the 1957-1960 period. This was a change in the procedure for hearing cases. In the 1961 decree no role was left for the residential public meeting, and the lowest state court of general jurisdiction, the people's court, was assigned important duties. A procedural distinction was drawn between cases of parasites who did not work at all and cases of parasites who had been registered in a job but did not report for work. The parasite who held no job was placed under the exclusive jurisdiction of a people's court, which however was supposed to try the case non-criminally and thus without such safeguards as were contained in the Code of Criminal Procedure. The parasite who was enrolled in a sham job could be tried by a people's court or by a public meeting of workers; discretion to select the forum was not expressly lodged anywhere, but subsequent commentary has made it clear that it is the government prosecutor's office that makes the decisions.

According to the decree, cases heard by a people's court are not subject to review in ordinary appeal but may be protested by the prosecutor to higher courts. Cases heard by a public meeting are subject to no review in

[16] "Society's Benefits for Toilers Only," *Sovetskaia yustitsia* (henceforth cited as *SY*), Moscow, No. 14, October, 1960.
[17] See Harry Willets, "The Wages of Economic Sin," and my "Execution: Hallmark of 'Socialist Legality,'" *Problems of Communism* (henceforth cited as *PoC*), September-October 1962.
[18] Decree of the Presidium of the Supreme Soviet of the RSFSR on the strengthening of the struggle with persons who shirk socially useful labor and lead an anti-social parasitic life, *SY*, May 1961, No. 10, p. 25.

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court, but the sentence does not take effect until it has been confirmed by the executive committee of the local soviet, which therefore is in a position to conduct an administrative review of the file; as the convocation of the public meeting may have come at the initiative, or at least with the approval, of the executive committee of the local soviet in the first place, the administrative review probably persuades the reviewers in most cases that the sentence was right and should be confirmed.

Another change was that under the 1961 decree the warning became not one of the consequences but one of the prerequisites of the trial. An anti-parasite proceeding now is not to be instituted until after the offender has been warned by the authorities to mend his ways and has disregarded the warning. Some convictions have since been set aside, on protest, by appellate courts on the ground that the necessary warning had not been given; more have been set aside on the ground that too little time had been allowed for the warned offender to reform.[19] The warning may be given by "civic organizations or state organs," including the police, the public prosecutor, a trade union, a comrades' court, and perhaps others. In most cases the way for a man to comply with a warning is to get a job, or, if he is already on the rolls, to work regularly at his job; however, sometimes it is hard to tell what the offender could have done after the warning to avert the subsequent proceedings. If the parasite has gone to work by the time his case comes to trial or even by the time it comes to the attention of a higher court (where that is possible), the exile is wrongful and must be set aside even though the offender took the job only after the expiration of a realistic term of warning; but he has to be supervised closely in his work lest the employment prove to have been a maneuver to circumvent the decree.[20]

Casting the Net

The Soviet statistics on crimes and quasi-crimes are, "as is well known," not well known. Even if we had numerical data on the operation of the anti-parasite laws, we should be unable to infer the number of proceedings against "parasites." Those laws do not reach all who in Soviet terms are parasites, and other laws reach some of the offenders who could otherwise be held liable under the anti-parasite laws: the overlap touches on one side the regular criminal code and the comrades' courts and, on another side, the administrative proceedings taken to deprive certain speculators of the property used in the speculation, such as rental housing.

Still, some semi-statistics can be put together. From a study of parasites sentenced in the first six months after the enactment of the decree of May 4, 1961, we can infer that at least 600 cases led to a conviction. Furthermore, it appears that 96 per cent of the parasites given a warning in the early months were not prosecuted, because they heeded the warning and found proper work.[21] Arithmetic calculations suggest that during the time in question at least 15,000 warnings were administered. As to convictions, a Soviet researcher suggested informally in mid-1963 that the index of convictions, by calendar quarters, might look something like this:[22]

	1Q	2Q	3Q	4Q
1961	—	100	150	200
1962	150	120	110	100
1963	75	50		

The role of the public meeting, reduced by the jurisdictional provisions of the 1961 decree, was reduced still further in operation. Most of the prosecutions under the law had to be brought before people's courts because the defendants were unemployed and thus not at-

[19] Resolution No. 6 of the Plenum of the Supreme Court of the USSR. September 12, 1961, *Biulleten verkhovnovo suda SSSR*, Moscow, 1961, No. 5.

[20] A. S. Shliapochnikov, *Borba s tuneiadtsami—vsenarodnoe delo*, Moscow, 1962, pp. 47-48; I.D. Perlov, *Sovetskaia obshchestvennost v borbe s tuneiadstvom*, Moscow, 1962, p. 22.

[21] Shliapochnikov, *op. cit.*, pp. 41, 46.

[22] Private conversation. If we assume the 600 cases to be reflected in the index figures of 100 and 150 for the second and third quarters of 1961, we get absolute figures roughly as follows:

	1Q	2Q	3Q	4Q
1961	—	240	360	480
1962	360	285	265	240
1963	180	120		

This artificial reckoning would yield a total of 2500 exiled parasites in the RSFSR in the first two years and two months of the operation of the decree. This seems low, and is lower than other figures including that in Feifer's *Justice in Moscow*, 1964, p. 196, which lists 2000 for 1961 alone in Moscow. On the other hand, Feifer's treatment of the anti-parasite law is cursory, and casual. For example, he appears to date its introduction in several outlying republics only from 1959, though several republics had enacted decrees in 1957 and 1958 and only one in 1959; he interprets "banishment" as meaning only "banishment from Moscow" though the decree to which he refers covers the whole Russian Republic; and he seems not to have noticed that the public meeting of "neighbors" of the accused is not preserved in the current decrees. *Ibid.*, pp. 188-89.

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tached to any occupational collective. It has been said that the sham workers were too often protected by their fellows. Even the few sham workers who were tried were usually brought not to the workers' public meeting but to the people's court. The government prosecutors may prefer this route because they regard the public meetings as too lenient, too different from ordinary criminal prosecutions, or too unfamiliar.

The laws against parasites seem to look two ways at once. One edge of the sword is turned against the violent drunkard, the wife-beater, the man who has never made it. Thus an American observer describes the trial in Moscow of one Zbarski—drunk, loathsome, scandalous, without work—who was exiled under the decree for three years.[23] Sometimes the decree is used to get rid of prostitutes, as appeared to be the case with one Maiseva, sentenced to five years after trial in the city of Chita.[24] The woman who instead of working spends her time slandering her neighbors and complaining to the authorities about imaginary threats is also a fit subject for exile.[25] Many of the offenders are young ne'er-do-wells who are depicted as living off their poor but industrious parents and spending their nights in drinking bouts.[26]

The other edge of the sword is turned against the man who disrupts the economic order by turning an illegal profit,[27] the over-privileged scion who seeks shelter behind the broad backs of his rich and powerful relatives,[28] the *stiliaga* in narrow trousers and duck-tail hair-cut lounging on the sidewalks of Gorky Street, the snob who likes to sport Western clothes and a Western nick-name.[29]

Yet it is also possible to speculate that the thrust of the sword is really all one, and that the weapon is being wielded in the interest of the values of a lower middle class rising to power. After all, many of the virtues celebrated in anti-parasite proceedings and in the literature about parasites are just those so often ascribed to the lower middle class: the glory of work in one's appointed calling; modesty in dress, toilet, deportment; adjusting to one's surroundings, making one's peace with the organization. In defense of these values the anti-parasite laws, like the comrades' courts and the volunteer people's guard, are used to repress "excesses" characteristic of either the lower or the upper class. On this view the self-appointed gravediggers of the bourgeoisie are now busy making the land safe for the *petit bourgeois*.[30]

Ironical though it may be, this explanation of the anti-parasite laws has much in its favor. As a part of the truth it must not be neglected; yet there are other facts in the picture which it fails to fit. First, the men and women in the party establishment do not seem effectively subject to the anti-parasite laws or other non-courts in the public sector, though party dis-

[23] See Feifer, *Justice in Moscow*, pp. 189-93. (A review of the book appears elsewhere in this issue—*Ed.*)

[24] A. S. Shliapochnikov, "Nekotorye pravovye voprosy usileniia borby s paraziticheskimi elementami," in Vsesoiuznyi institut yuridicheskikh nauk, *Uchionye zapiski*, vyp. 14, Moscow, 1962, p. 112.

[25] L. Kashin, ". . . and the Full Force of Soviet Laws," *Literaturnaia gazeta*, July 4, 1963 (two years).

[26] Case of Yurii Vasilevich Lebedev, People's Court, Oktiabrski Raion, Moscow, July 12, 1963 (personal observation). Lebedev had been trained in trade school as a plumbing mechanic, and had earned 110 rubles a month, but he had quit work and had stayed out of work despite warnings since April. Former employers referred in writing, and neighbors testified, to his drinking; one neighbor said, sadly, that Lebedev when sober would not hurt a fly but was seldom sober.

[27] The numerous cases under this head have included the collective farmer who spent too much of his time on his private plot; the repairer of musical instruments who instead of repairing for an authorized fee bought, repaired, and resold for a capitalist's profit; the *shabashniki* who tour the countryside in teams, doing badly and at a high price the odd construction that the collective farm chairman cannot wait to have done by the regularly assigned crews. One offender had swindled himself into the construction of an elaborate personal dwelling house, posed as a senior engineer with false credentials, and gone into business as a *tolkach* (expediter, sometimes influence-peddler or five-per-center); when tried as a parasite, he feigned madness by barking and crowing, but he was sentenced to five years. See N. Vorobiov and V. Zhuravski, "Triangle and Hats," *Pravda*, May 16, 1963.

[28] See "The Future Belongs to . . . Parasites?", *PoC*, May-June 1963, p. 1.

[29] The offenders who had speculated in foreign clothing seem to have offended as much by their un-Soviet tastes as by their activities. The accounts carefully list the preference of Vladimir Vorobiov, who asked British tourists to call him Bobby (*New York Times*, Nov. 13, 1960); of Boris Khurgin, who called himself Bob (*New York Times*, August 26, 1964, citing *Moskovski Komsomolets*); one Golubiov, who was known as Misha Finn (*Pravda*, May 31, 1963). There are even some apparent recidivists. Compare the two stories on Alexander Shepelenko and on one Shepelinko (*sic*) reported in *The New York Times* three years apart (November 12, 1960, and September 11, 1963), which both concern an habitual speculator in foreign goods, especially clothing. The age of Shepelenko, or Shepelinko, was given as 22 in each account. A recidivisit? A brother or cousin? A coincidence? Or a thrifty reporter?

[30] Sometimes the sword is wielded just for the exercise. A Soviet jurist reported in March, 1964, that the leaders of a certain collective farm had worked up a written plan to exile "not less than four to eight persons in accordance with the Decree . . . of May 4, 1961 . . . since the said Decree has never yet been put into operation in the collective farm. . . ." Yu. Georgiev, "How Not to Fight Parasitism," *SY*, No. 6, 1964.

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cipline may be exerted from time to time for similar reasons on some "upper-class" cases. Second, the Soviet ideologists would deny that a social class structure in this sense exists in Soviet society; anyone in any station can be part of the *narod* (the people) just as anyone in any station can be an *obyvatel* (Philistine, selfish vulgarian). Third, the procedures used to further these lower-middle-class values are derived from rather unlikely models, such as the village assembly and the pattern of peasant collective censure. Fourth, certain values usually associated with the lower middle class in European and American society are not only absent from Soviet ideology but attacked as unworthy: one thinks in particular of the value of personal thrift (or personal accumulation) and of the value of privacy or discretion in personal relations. The individual pioneer, the self-reliant Titan raising his edifice of thought or invention or production, is not an approved model in collectivist society.[31]

We do not know whether the anti-parasite law is used to punish, or to discourage, political opposition. There seems to be no evidence that the trial proceedings are concerned with directly political matters. No doubt a man who tried to devote any substantial time to building an independent political group or theory would qualify as a parasite in the Soviet sense, but he would thereby have offended other and sterner prescriptions also, and other bodies would handle his case.

The emphasis on the prosecution of young men who affect foreign ways probably has political significance for at least some of the participants. Other political bias is shown in the prosecutions of evangelists and unorthodox artists. The recent conviction of a young Leningrad writer and translator of poetry, Yosif Brodsky, has become well known outside the Soviet Union because detailed notes of his two trials have been published in Europe and the United States.[32] Brodsky left school at 15 and worked briefly at many jobs. Senior writers and critics submitted testimonials vouching for his diligence and competence. The accusers at his parasite trial charged him with having written pornographic poems and corrupting the young. They attacked lines in his poems: "I love another homeland," "I have long thought about going beyond the Red line," and, in a letter, "I felt like spitting on Moscow." Brodsky was sentenced to five years and, according to report, was sent to a state farm near Archangel; since then, conflicting rumors have been circulated about his release, transfer, and continued detention. The trial notes indicate that the judge and some others exhibited a harsh and flippant anti-intellectualism, with undertones of anti-semitism.

Dubious Succcesses and Embarrassing Failures

Soviet commentators sometimes treat the parasite laws like a nuclear arsenal, maintained more in order to make threats credible than to be regularly invoked. Mere enactment and dissemination of the anti-parasite decrees, some have claimed, have driven the great majority of parasites into regular work.[33] Of the rest, all but a few are said to have been reformed by the obligatory warning.[34]

The Soviet study of six hundred parasite convictions in 1961 indicated that the maximum sentence of five years was passed on 43 percent of the cases; 25.5 percent got three years, 20 percent two, 11.5 percent four.[35] The Supreme Court complained in the same period that sentences below the minimum were being passed by people's courts;[36] perhaps some lower courts had taken too seriously the assertion that anti-parasite penalties were not criminal.

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[31] To cite just one characteristic example: The controversy over V. Dudintsev's book, *Not by Bread Alone*, published in Moscow in 1956, was not limited to its having opened some closets in which readers might see skeletons or to its condemnation of a harsh, "transitional" executive (Drozdov). The author was criticized also for having made a hero of a lonely inventor.

[32] See, e.g., *New York Times*, August 3, 1964. Versions of the trial notes, taken by a spectator, have been printed in the West in (among other journals) *The New Leader* (August 31, 1964), and *Encounter* (September 1964). A. B. Chakovski, editor of *Literaturnaia gazeta*, had a simple explanation of the case. See *New York Times*, December 20, 1964, sec. 6, p. 22: "Brodsky is what we call a *podonok* [scum] . . . .—a plain and simple *podonok*. He was tried in open court under the established procedures of our law; he defended himself; the judges heard all the relevant testimony from literary experts and from Leningrad public opinion—and then came to the conclusion that he should be banished from the city and given some honest work. I think it is simply amusing that you [Americans] can work up so much self-righteous indignation about the so-called 'Brodsky case' when here bombs are thrown into churches, young girls are killed, and the killers allowed to go free."

[33] I. D. Perlov, *Sovetskaia obshchestvennost v borbe s tuneiadstvom*, Moscow, 1962, p. 19.

[34] *Ibid.*, p. 20: "In Tomsk province, out of 100 who were warned, 98 got jobs, and measures of administrative influence were applied to only two." The roundness of the total suggests a percentage rather than an absolute figure. *Cf.* Shliapochnikov's figures at note 21 above.

[35] Shliapochnikov, *Borba s tuneiadtsami* . . . , p. 46.

[36] Resolution No. 6. . . . , *loc. cit. supra* n. 19, p. 8.

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Very few of the sentences have included confiscation of the property earned by means other than labor. The reason has not been made clear. It is not very probable that the authorities would be stopped by the difficulty of tracing the property if they determined to search for it, but they may not think it worth the effort, or most of the defendants may not in fact have acquired much property by the means indicated, though it can be argued that possession of such property is a principal index of probable guilt and even that it is a necessary element in the offense; or some of the offenders who have such property may be guilty of some regular crime, like speculation, and thus in theory not liable to trial as parasites. A more speculative possibility was raised by an official opponent of a dissertation on the interrelationship of norms of law and morality, submitted in the Institute of Philosophy: he referred to the practice in the administration of the anti-parasite laws that require the defendant to show how he obtained the property, and hinted that it might violate the presumption of innocence.[37]

The place of ex-settlement is not specified in the decrees. In the Russian Republic most of the offenders appear to be settled in the Krasnoiarski Krai. Many of them come as unskilled (non-) laborers. They are put to work on collective farms, in factories, at construction sites, in lumber camps. Though there are criminal sanctions for refusing to work at places of ex-settlement, some—again we do not know how many—refuse and are subject to "corrective labor" at docked pay and, if they persist, to "deprivation of freedom."

The failures of re-education have been attributed to the solidarity of the parasites, or their mutual contagion; being settled together, they continue—again, in an unknown percentages of cases—to encourage one another to shirk, to drink, to loaf, to steal. One writer has recommended that they be dispersed singly or in small groups among healthy collectives.[38] The managers of the enterprises to which the exiled parasites are assigned do not seem to be overjoyed by the abundant supply of labor; there have been reports of managers falsely attesting to a parasite's reform, so as to be allowed to ship him back home.[39]

In Siberia, the authorities have gone so far as to protest the transportation of parasites. Many of them, it seems, not only continue to lead a parasitic way of life but disturb public order, commit more serious offenses, and even corrupt others.[40] Still other parasites, the authorities contend, begin to behave well only after serving half of their term so as to take advantage of provisions for parole. To put an end to these trends, a solution opposite to that of dispersal has been suggested—namely, that the parasites be concentrated in special work colonies, presumably far enough from normal civil life to lessen the danger of contamination.

It is safe to assume that the stories of rehabilitation, written from Moscow (as most of them appear to be), are not very representative. The home team may be glad to hear that the transported parasite is making good Out There if only he stays Out There; the men who are responsible for public order in the places of settlement have a different outlook.

The People and the State

One of the claims made for the non-courts in the Soviet Union is that they bring the processes of justice closer to the people and at the same time induce the people to take part in the processes of justice. In part, the claim is justified. When a civic accuser or defender speaks in a criminal trial, he does represent an organization or collective even though the collective decision authorizing his effort may have been inspired and guided from above. When a court holds sessions in the Little Red Corner of an apartment house or the club-room of a trade union local, many attend who otherwise probably would not, and the responses of the audience frequently interact (not always in the interest of justice) with the proceedings "on stage." The speeches made by members of the audience toward the end of a trial in a comrades' court, while some of them appear to reflect the instructions of the local *aktiv*, do convey a sense of popular morality—channeled into a state-established, though nominally unofficial, sanction. The authorities go to considerable trouble before and during the trials of accused parasites, both in people's courts and at public meetings of workers, to mobilize the

[37] Oral statement at the defense of a dissertation in the Institute of Philosophy, Moscow, June 1963.

[38] V. Titov, "A Field Report on the Parasites," *Krokodil*, Moscow, No. 2, 1964, p. 7.

[39] S. Bunkov & Iu. Feofanov, "Cloud without Rain," *Izvestia*, June 23, 1964.

[40] A. Sokolovski and G. Guzhbei, officials on the staff of the government prosecutor's office in Amur Province, "Punishment and Education," *Izvestia*, July 30, 1964. *Cf.* Lipson, *PoC*, May-June, 1963, p. 6: ". . . he is more likely to infect others in the place to which, than in the place from which, he was sent."

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expression if not the reality of public sentiment.

Nonetheless, it is clear that the "popularization" of justice tends to bring an ever larger portion of life under the eye of a watchful regime. The non-courts do not—as is sometimes asserted—merely relieve the official courts from that portion of their case-load that can be handled with less formal procedures and less drastic sanctions. A comparison between all the cases handled by the regular courts in, say, 1956 and those handled by the courts and non-courts together in 1964 would reveal that the range of supervised conduct has markedly increased. So have the number of sanctionable offenses, the total number of cases, the amount and probably even the median severity of the penalties handed down. The comparison would very likely hold good even if the 1956 figures were augmented by the caseload handled by the predecessors of today's comrades' courts and of today's volunteer people's guard. The Soviet regime has become less repressive; but it does not show many signs of becoming less comprehensive.

Procedures in cases against parasites fit into a pattern that has been described more thoroughly in its application to small and limited organizations than in relation to an entire polity. In many countries, certain types of institutions share an approach to the individual, an official ethic, and a mode of operation that have led a sociologist to call them "total institutions." Examples may be found in the work of many mental hospitals, insane asylums, prisons, reformatories, army camps, concentration camps, some preparatory schools, and the training programs of certain religious orders. Some of the features of these institutions closely resemble ordinary life in the Soviet Union as a whole, and one of the most striking resemblances is the practice that the sociologist has called "looping." [41]

Looping takes place between institution and individual and appears most clearly when the institution is most nearly "total." In those cases, officials of the institution, doing their duty as they see it, have acted upon or against the individual (patient, inmate, prisoner, recruit, novice—or, in the Soviet Union, citizen). The subject responds by defensive reaction. Then—and here is the place where the loop is made—the officials of the institution treat the subject's defensive response as evidence confirming the rightness of their initial judgment or diagnosis or punitive measure, and inflict more of the same. Sometimes the loop is traveled through several circuits.

How does looping occur in the operation of the anti-parasite laws in the Soviet Union? One instance is the counter-response to the Grin. In anti-parasite cases, as well as in comrades' courts, the defendant often reacts to his odd and unpleasant situation (no matter whether he deserves, by his or the regime's criteria, to be put in it) by a tight, fixed grin. This grin thereupon becomes an added offense; prosecutors, civic accusers and judges comment on the grin, "which shows that this defendant has no respect for our Soviet laws, has a frivolous attitude toward his social obligations, and mocks the authority of this tribunal." [42] The judgment itself, though it may not mention the grin specifically, will refer to the defendant's contemptuous attitude in court as one of the signs that he is in need of correction. The grin has its counterpart in the smaller "total institutions" when the subject is not permitted the luxury of an autonomous facial reaction (sneer, pout, disgust, frown) and must keep a blank face lest the severity of the sanction be increased.

Another example lies in the blurring of the lines between various parts of a subject's existence. In the mental hospital what the patient does or says on the ward where he sleeps or in the shop where he works is observed, perhaps by different officials, but it is part of the job of the institution to collate the observations, to relate them to a picture of the whole man. The freedom of ordinary civil life, where work, play, family, public service, social life can be kept in separate though not completely sealed compartments, is infringed in the total institution for the subject's own good—as the institution views it. Correspondingly, in the Soviet Union it is not only permissible but obligatory for the authorities to collapse the separate structures of a subject's daily life by piecing together the observations recorded by his family, his colleagues, the housing committee, the union officials, the party representatives.

A third example lies in the use made by the official of information elicited from the subject

[41] Erving Goffman, *Asylums: Essays on the social situation of mental patients and other inmates* (Garden City, N. Y.), 1961, pp. 35-37.

[42] In one case a civic accuser said, "I wish I could have photographed the grin with which this defendant looked at the Court so that I could show the picture to the audience behind him." (Personal observation)

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himself in the interests of the program of the institution (again ostensibly for the good of the individual as well as society). A mild form of this can be seen in the use made of interviews and questionnaires in market research and political polling. A more intensive form is practiced in certain kinds of psychotherapy. In the Soviet Union, the authorities profess to encourage candor but in practice reserve the privilege of using the elicited material to justify further sanctions.[43]

To a lawyer, the closest parallel in a looser society is the process by which a convicted defendant is sentenced. At the point of sentencing, the privacy and autonomy that have been preserved at least in the public forum are discarded; testimony, under safeguards of no great rigor, is taken from the district attorney, police officers, welfare workers, and others; the convict himself is heard, but what he says is likely to be used against him. Not only the Soviet anti-parasite proceeding but also Soviet life as a whole is governed to some degree by similar rules. It is almost as if a Soviet citizen came into his society already convicted and ripe for the sentencing.

[43] In the Lebedev anti-parasite trial, note 26 above, the judge, interrogating a witness, suddenly turned to the defendant and said to him, in effect, "In other words, you told the police that you would find work within a couple of weeks and then you made no serious effort to look for work?" The judge's posture, look, and tone all conveyed a question to the defendant, who not unreasonably started to speak: "Well, but I did look in at a factory shop on —." The judge broke in: "Keep still, I am questioning a witness. Don't interrupt. Your time to speak comes later. Mind your manners." The account of the Brodsky trial abounds in similar instances of baiting.

Comradely Justice:

How Durable Is It?

By Albert Boiter

Most jurists would probably agree that in the last decade greater stability and modernization have characterized the Soviet legal system, which had grown increasingly rigid and divorced from constructive social purpose under Stalin and Vyshinsky. At the same time, many of the changes, reforms, and experiments seem to have been inspired more by ideological considerations than by aspirations toward justice as commonly understood in most democratic societies and as embodied in conventional law. The resulting picture has been so uneven and contradictory that it is difficult for an outside observer to describe with assurance what is actually going on, much less to attempt prognostication.

A prime example of the experimental trend under Khrushchev was the emergence of various institutional methods for promoting wider public participation in the administration of justice at the local level, especially the revival of what might be termed parajudicial methods of public trial for minor law violations or lack

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of discipline. The term "revival" is appropriate, inasmuch as analogous institutions existed at earlier stages of Soviet development.

At the present time, Soviet legislation provides for two methods by which an individual may be subjected to a "social" trial by informal, non-judicial assemblies: 1) comrades' courts or 2) *ad hoc* general meetings authorized for trial of so-called "parasitic elements." Although the latter contains some extra-legal features, neither of these institutions can be regarded as direct descendants of the old NKVD/MVD "special sessions." Their ostensibly loftier goals have been described variously by Soviet writers. USSR Supreme Court Judge G. Z. Anashkin put the matter succinctly in a recent radio talk:

The Soviet state has set as its aim not only to reduce crime in the country but to liquidate it completely. Whereas in the world of capitalism compulsion is the fundamental method of influencing and preventing law violations and this is realized entirely through the police and the courts, in the Soviet state administrative measures are being replaced by various forms of persuasion.[1]

Both the comrades' courts and the trials of "parasitic elements" are based upon legislation first made applicable to the entire USSR in 1961, although both institutions existed actively prior to that date and major alterations of the 1961 legislation have been subsequently introduced. It is necessary to point out that despite certain superficial similarities, the two institutions referred to have very little in common. Moreover, a projection of their contrasts onto the wider screen of current Soviet law and ideology provides considerable insight into their juridical characteristics and offers at least *some* basis for evaluating their chances of survival. This exposition will concern itself with the emergence, at times parallel and at times in juxtaposition, of the two institutions since 1956. By calling attention to their salient features, the author hopes to clarify the precise positions occupied by both institutions in the legal-ideological landscape of the USSR.

The Recurring Experiment

In the history of the comrades' courts three high points can be distinguished. They first came into existence during the years of War Communism, but faded away with the coming of NEP or, to be more specific, with the adoption of the RSFSR Labor Code in October 1922. Their second flowering, which saw the birth of more diffuse types of social courts, began in 1928. By 1932-33 comrades' courts were at the height of their development, only to go into a decline during the "purges," becoming completely dormant by the outbreak of World War II. The third and current phase of the comrades' courts as a massive national institution began at the time of the 21st CPSU Congress in early 1959.

Despite the idealistic flavor of the reference in the 1919 Party Program to "the principle of comradely tribunals selected from the accused person's fellow workers,"[2] Lenin himself looked upon the Disciplinary Comrades' Courts (created by the RSFSR statutes of November 1919 and April 1921) as tactical instruments in the class struggle rather than portents of an ideal society. His concern lay with their "disciplinary" rather than their "comradely" aspects. In the three-cornered debate about the role of trade unions in the socialist state, which broke out among the Soviet leaders at the end of 1920, Lenin rebuked both Trotsky and Bukharin for wasting the party's energy in a futile debate with the syndicalists "about generalities instead of engaging in a businesslike and practical 'economic' discussion on who can best and most successfully dispense payments in kind and organize the disciplinary courts."[3] Speaking to the Eighth Congress of Soviets on December 20, 1920, Lenin denounced Bukharin's concept of "production democracy" as "complete nonsense" and subsequently labeled Trotsky's talk of "production atmosphere," "production role," etc. as phrase-mongering.[4] Lenin argued that disciplinary courts and payment in kind were practical measures which "will mean a hundred times more for the taking over of the economy, the administration of industry, and raising the production role of trade unions, than purely abstract, and therefore empty, words about 'production democracy' or 'coalescence' and so forth."[5] Lenin thought of the early comrades' courts, which in fact were mainly concerned with the problems inside industrial enterprises and were primarily appendages of the trade unions, as the "stick" of

[1] Radio Moscow, Nov. 26, 1964, 1345 GMT.

[2] This explanatory translation appears in a Comintern brochure, *Program of the Russian Communist Party (Bolsheviks)*, published in Moscow in 1920 (*Communist Library, No. 6*).

[3] V. I. Lenin, *Sochineniia*, 4th ed., Moscow, Vol. XXXII, p. 64.

[4] *Ibid.*, p. 38.

[5] *Ibid.*, p. 63.

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a carrot-and-stick policy whose use he considered necessary in dealing with the industrial labor force.

How harshly punitive these early comrades' courts were can be gauged by the fact that under the statute of November 14, 1919, they were authorized *inter alia* "to judge as nonworking elements persons who stubbornly refuse to submit to comradely discipline or have been repeatedly penalized, to dismiss them from the enterprise, and hand them over to a concentration camp." [6] In March 1921 a resolution of the 10th Party Congress acknowledged that these courts had been used as "special organs of proletarian compulsion especially against certain backward workers who still were not clear about their class obligations." With an eye to NEP, however, the resolution said that "the main method of the trade unions is not compulsion but persuasion, which in no way precludes the trade unions in case of need resorting to the principle of proletarian force (compulsory mobilization . . . , disciplinary courts, and so forth)." [7] When, on April 5, 1921, a new statute on disciplinary comrades' courts appeared, the penalties imposed were sharply reduced although the right to mete out prison sentences of up to six months was retained.[8] In 1921 the disciplinary comrades' courts in the city of Moscow were reported to have handled 17,953 cases, more than half of which involved unauthorized absence from work; most of the others were concerned with violations of internal work rules, loafing on the job, or petty theft. The judgments handed down for those found guilty consisted mainly of sentences to compulsory labor or overtime work at the place of employment (39 per cent), reprimands (28.2 per cent), or dismissal (10.6 per cent). However, some 420 persons were sent to concentration camps and another 89 given short prison terms.[9]

A different emphasis altogether accounted for the origin of the second period of experimentation with comrades' courts, at the end of the NEP period. The central contribution which it was thought such informal, social bodies (both rural and urban) might make, was the expansion and improvement of the state judicial system at the grassroots level and, in particular, "relieving the people's courts of the least important categories of the run-of-the-mill-cases." [10] An RSFSR decree dated March 26, 1928, aimed at introducing a more liberal attitude toward punishment and wider use of corrective-labor at the place of work as a substitute for imprisonment, instructed the People's Commissariat of Justice to grapple with the problem by activating the comrades' courts at work enterprises, and by creating special village organs designated as "conciliation chambers" (*primiritelnye kamery*).[11] The purpose of this was to provide a forum which would divert from the people's court a host of petty litigations on charges filed by individuals. On July 10, 1929, the all-union government issued a decree which ordered the setting up of experimental districts (*okrugi*) in the various republics where ideas dealing with the reformation of judicial agencies could best be tested.[12] The RSFSR complied within a few days by designating three testing *okrugi* around the centers of Stavropol, Chelyabinsk, and Kursk. This was followed by a report from the Commissariat of Justice outlining three steps it proposed to take in those regions by December 1929. One of them concerned the creation of new institutions "along the lines of the comrades' courts," including the organization of such bodies on a regional as well as occupational basis, in rural as well as urban areas. Endorsed by the RSFSR government on August 26, 1929, this report is of note because it contains the first comprehensive list of cases that might properly be heard by various types of comrades' courts.[13] It also laid the cornerstone for the eventual creation of comrades' courts in large urban apartment houses, although another two years were to elapse before a satisfactory statute covering this type of social court could be adopted.[14]

This background is important in the light of subsequent developments; it shows that despite the varying courses taken by the different types

[6] *Sobranie uzakonenii i rasporiazhenii rabochekrestianskovo pravitelstva RSFSR* (hereafter cited as *SU RSFSR*), Moscow, 1919, No. 56, item 537.

[7] *Cf., KPSS o profsoiuzakh,* 3d ed., Moscow, 1957, p. 100.

[8] *SU RSFSR,* 1921, No. 23-4, item 142.

[9] A. Gertzenson, in *Sovetskoe gosudarstvo,* Moscow, 1933, No. 6, p. 66.

[10] *SU RSFSR,* 1929, No. 37, item 388.

[11] Organization of corrective labor in both rural and urban areas was assigned to the NKVD by a decree of May 31, 1928, *SU RSFSR,* 1928, No. 57, item 426.

[12] *Sobranie zakonov i rasporiazhenii raboche-krestianskovo pravitelstva soiuza Sovetskikh Sotsialisticheskikh Respublik* (hereafter cited as *SZ SSSR*), Moscow, 1929, No. 45, item 389.

[13] *SU RSFSR,* 1929, No. 67, item 662. The RSFSR statute of Aug. 27, 1928, which authorized the creation of Factory Comrade's Courts had given them jurisdiction only over cases of personal insult brought by the complainant (*SU RSFSR,* 1928, No. 114, item 707).

[14] Statute adopted in RSFSR on June 30, 1931 (*SU RSFSR,* 1931, No. 36, item 295).

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of social and comrades' courts, a more or less uniform base of legal concepts and purposes was the source of their origin. Their common heritage was conventional law whose roots lay in the practical problems of public administration rather than in Marxism-Leninism. The ideological significance with which they were invested by the publicists of the day conformed to the optimistic view then held by Soviet jurists: that the socialist state would become less and less repressive and law would become progressively more informal and educative.

Rise and Decline under Stalin

In 1930 an institution called Rural Social Courts, created by an all-Union decree, replaced the conciliation chambers. Like its predecessor, it operated under the aegis of the village soviet.[15] Collectivization saw a more or less spontaneous development of Kolkhoz Comrades' Courts in some areas, but official attitudes toward them were ambiguous since they competed with the authority of other rural organizations.[16] Comrades' courts dealing with urban housing appeared as a result of the liquidation of what was formerly known as "conflict commissions" whose purpose under the city soviets had been to resolve tenant-landlord quarrels and civil disputes between tenants; only the latter category of such cases became the prerogative of the new housing comrades' courts. Legislation on various types of comrades' courts continued to pile up during the 1930-1932 period, and an outer limit must have been reached with the creation of comrades' courts for nomads in 1933.[17] The movement was perhaps at its peak at the time of the first (and only) all-Union conference of industrial comrades' courts held in January 1933. Actually, signs of retrenchment had already appeared before this date, at least with respect to the comrades' court in industry, at the 16th Party Congress in mid-1930.[18]

Guilt: A Socialist Weapon

. . . . A comrades' court helps a person who has committed a violation of the law to become more deeply conscious of his guilt toward the collective, and it often has a stronger influence on the guilty person than a hearing of the same case by an administrative commission under the executive committee of the local soviet or by a people's court.

For example, the comrades' court of the Kharkov Freight Car Repair Plant heard the case of the unworthy behavior of B—, a worker in the assembly shop. The comrades censured her actions severely. Turning to her, the worker Comrade Belimenko said:

You disgraced not only yourself but the entire collective of the plant as well by committing petty theft. You have stained the workers' honor and must answer to your comrades.

The comrade's direct, candid and stern remarks strongly affected the worker, and she declared that she was deeply conscious of her guilt toward the collective and was sincerely repentant for what she had done. In view of this, the comrades' court limited itself to imposing a public reprimand. Events confirmed the correctness of the chosen measure of social pressure: the worker now labors honorably at the enterprise. And there are many such examples.

—*From "Comrades' Courts," by G. Kaznin, Pravda, November 13, 1963.*

Stalin, unlike Lenin, appears not to have taken any public notice of the comrades' courts; however, both he and Lenin shared an interest in the strict enforcement of worker discipline by all possible means. One consequence of Stalin's overthrow of Mikhail Tomsky as head of the trade unions (an event which the 16th Party Congress celebrated with great polemical gusto), was the conversion of the unions into an agency of state pressure on the labor force. Nikolai Shvernik, the new head of the All-Union Central Council of Trade Unions (VTsSPS), did refer briefly to the industrial comrades' courts in his speech at the 16th Party

[15] See decree "About the Organization of Rural Courts," in *SZ SSSR*, 1930, No. 51, item 531; as amended *ibid.*, 1931, No. 5, item 65, and *ibid.*, 1932, No. 29, item 180.

[16] Taking a stand-pat attitude, the RSFSR Commissariat of Justice decided that no new kolkhoz comrades' courts should be formed but those in existence need not be abolished (M.V. Kozhevnikov, *Istoriia sovetskovo suda*, Moscow, 1957, 213).

[17] *SU RSFSR*, 1933, No. 54, item 241, and No. 58, item 271.

[18] Jurisdiction in child-support cases was taken away from the rural social courts in July 1932 (*SZ SSSR*, 1932, No. 62, item 355) and in kolkhoz property cases six months later (*ibid.*, No. 82, item 503).

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Congress, but only with respect to the ways of reducing violations of labor discipline.[19] Shortly thereafter, on September 8, 1930, a "special statute" was endorsed by the VTsSPS Presidium ordering the trade unions to take over the "leadership" of the industrial comrades' court, subject only to the "control" of a people's court;[20] the nurturing guidance of the lawyers of the Justice Commissariat was pushed aside. As under Lenin, a major shift of emphasis from the "comradely" to the "disciplinary" took place: a new RSFSR Statute on Production Comrade's Courts, duly enacted on February 20, 1931, allowed factory management to bring charges against workers in the comrades' court.[21]

Various reasons have been advanced by Soviet authors to explain the decline of the comrades' courts of the 1930's: the built-in weaknesses in the legislation, the absence of a single statute for all comrades' courts, the unclear and conflicting supervisory responsibility for these bodies among state administrative agencies, the ambiguity in their relationship to the judiciary, the diminution of their competence resulting from the expansion of the scope of criminal law, the centralization of law-enforcement in all-Union hands. Although it is conceivable that the institution might have survived such relatively low-level official indifference, it also had to contend with hostility in high places. Vyshinsky is reported to have told a Ukrainian conference of public prosecutors (officials in the procuracy) in October 1936 that "the old twaddle about mobilizing activists from the ranks of the public and the formation of groups of volunteer helpers should be completely done away with; something else is needed now." Soon afterwards, when this view was reflected in the official organ of Vyshinsky's agency, local officials took it as "a directive to remove from informal social groups any functions related to Soviet law and order."[22] As decisions were to be made less by the rank and file than officials in bureaus, and the criminal courts were to handle more and more cases of labor discipline-violations, the comrades' courts had lost their usefulness. Article 19 of the Model Work Rules of January 18, 1941, for instance, stated flatly that "every violation of labor discipline is subject to disciplinary penalties or is handed over to a state court."[23] The possibility of trial by tribunals selected from one's fellow workers had died a long time ago. For a succinct explanation of what killed the comrades' courts of the 1930's the word "Stalinism," with its multiple connotations, perhaps serves as well as any other.

In 1951 a feeble and unheralded effort was made to revive the industrial comrades' courts following the partial repeal of the harsh labor legislation of 1940-1941. However, the new statutes permitted them to hear only cases involving unexcused absenteeism—and then only if the case was brought by the factory management.[24] The courts continued to exist in some large enterprises throughout the 1950's as weak ancillaries of the management's right to punish work-rule violators, but they commanded no respect either among the workers or among the plant administrators themselves. It is noteworthy that the USSR Supreme Court, in an effort to deter overuse of the ultimate disciplinary penalty of dismissal, attempted to compel factory managers to resort to alternate means such as comrades' courts, as preliminary to dismissal. But the actual significance of the court's interpretation was not great. In practice, hardly a flicker of life could be detected in the old comrades' courts until the spring of 1959. The relevant laws, which dated back to 1930-31, were still in the books, but the institutions as such lay immobilized. Khrushchev's proposal for the active revival of comrades' courts at the 21st CPSU Congress resurrected them from their grave.

Parasites or Comrades?

While he alone spoke the magic words which precipitated the third major period of experimentation with comrades' courts, Khrushchev cannot go on record as a personal champion of the idea; indeed, in public utterances after 1959 he virtually ignored them. Like Lenin and Stalin, Khrushchev seems to have looked upon the potentialities for social pressure inherent in

[19] *XVI sezd VKP(b)*, 653.
[20] *Cf., Trudovoe pravo. Entsiklopedicheskii slovar*, Moscow, 1959, p. 340.
[21] *SU RSFSR*, 1931 No. 14, item 160.
[22] A. Vinberg, G. Kocharov, and G. Minkovskii in *Sotsialisticheskaia zakonnost*, Moscow, 1962, No. 3, p. 18.
[23] *Sob. Post. SSSR*, 1941, No. 4, item 63.
[24] A new statute was approved on the same day as an all-Union decree (July 14, 1951) which authorized substitution of "measures of disciplinary and social influence" for certain work-rule violations treated as criminal offenses since 1941. Neither of these 1951 legislative acts were widely publicized until the new decree in April 1956 abolishing criminal liability for all violations of work rules (*Vedomosti SSSR*, 1956, No. 10, item 203).

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such loosely organized groups of citizens mainly as a force to be harnessed and manipulated by the party for immediate economic ends. His own specific contribution to the institutional forms this group pressure might take was the so-called anti-parasite law, a unique amalgam of intimidating punitive sanction and non-judicial trial. While not officially attributed to Khrushchev, the evidence at hand leaves no doubt that the anti-parasite law stemmed largely from his inspiration and initiative.

The beginnings of a special procedure for parasites, as an adjunct to the internal administration of the kolkhoz system dates back to 1948-49. Its author was Khrushchev, then First Secretary of the Ukrainian CP. Speaking at a plenum of the Ukrainian CP Central Committee on May 25, 1948, Khrushchev expounded his attitude:

Bolsheviks have no right to deal gently when the matter concerns the struggle against . . . idlers, parasitic elements, violators of public property—all those who sit on the shoulders of honest kolkhozniks and prevent the kolkhoz from making rapid progress.

. . . The Model Charter on Artels as well as Soviet laws are conducive to the calling to account of foot-draggers and unstable people, and of throwing them out of the ranks—like weeds.[25]

Less than a year later the main party theoretical journal *Bolshevik*, called attention to what Khrushchev had done in practice:

Particularly interesting is the experiment of conducting general meetings (obshchee sobranie) *in the kolkhozes of the Ukraine where, as N. S. Khrushchev has said, the honest kolkhoz members under the leadership of the party organizations have created intolerable conditions for idlers, antisocial, and parasitic elements. These meetings have helped to improve labor discipline sharply and to reduce absenteeism and tardiness to almost zero.*[26]

Notwithstanding the elaborate provisions in the drafts for the convocation of such general meetings in urban as well as rural areas, the 1957 anti-parasite laws were aimed primarily at kolkhoz shirkers. The problem of kolkhoz labor discipline may also have been primarily on Khrushchev's mind when he first broached the subject of anti-parasite laws at a regional agricultural conference in Gorky on April 8, 1957—a subject to which he returned in a broader context in a speech delivered in Minsk in early 1958:

Now about loafers. When I spoke about this at the conference in Gorky, I had in mind a draft law which proposes to grant the right to kolkhozniks, workers, employees, and the whole population to decide how slackers, idlers, people without a definite occupation or who live on some kind of unknown source of income should be dealt with. Workers have a right to check and, if it is established that such people actually live by dishonest work and are unwilling to reform, to cast them from their midst.[27]

When the large-scale revival of comrades' courts was proposed at the 21st CPSU Congress in 1959, the anti-parasite laws were temporarily relegated to the background. Actually, though it is not widely recognized, the appearance of the 1957 draft law had temporarily halted a high-level effort, already commenced, to revive the comrades' courts. *Izvestia* printed an article by the RSFSR Deputy Minister of Justice urging such a revival as early as the autumn of 1956,[28] and a detailed review of letters from its readers on the topic was published only a few weeks before the alternative decision was reached, in early 1957, to experiment with the anti-parasite law.[29] Thus, one can deduce that the Soviet leaders had a clear choice to make, at least at that time, between the comrades' courts and the anti-parasite law.

The fact that it was Khrushchev who gave voice to the shift of emphasis at the 21st Congress may have been largely fortuitous. The comrades' courts were but one of a whole panoply of measures, for which the party Congress served as a stimulus and matrix, to increase the participation of unpaid citizen volunteers in minor police-judicial functions.[30] Even more important, perhaps, was the role this congress played in launching a general penal policy, noteworthy for its relative liberality and mildness, which was defined shortly thereafter in new instructions to people's court judges and public prosecutors to employ sanctions other

[25] N. S. Khrushchev, *Bolshevik*, 1948, No. 10, p. 19.
[26] Ts. Stepanian, *ibid.*, 1949, No. 5, p. 26.
[27] *Izvestia*, Jan. 25, 1958.
[28] G. Anashkin, *Izvestia*, Dec. 14, 1956. See also N. Rumiantsev, *ibid.*, Aug. 30, 1956.
[29] *Izvestia*, Mar. 20, 1957.
[30] First and most prominent were the *druzhiny* formed by a statute adopted Mar. 2, 1959. See *Sotsialisticheskaia zakonnost*, Moscow, No. 6, 1959.

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COMRADES UNDER CRITICISM

Upper right: He cried himself out. . . .
From top to bottom: To the court with him! . . . Or we shall mete out a severe reprimand! . . . Or perhaps we ought to limit ourselves to a simple reprimand? . . . We'll give him a vacation in the south!

—*From* Krokodil (Moscow), *Aug. 10, 1963.*

than imprisonment wherever possible.[31] It will be recalled that a similar shift in 1928 preceded the re-emergence of comrades' courts at the end of NEP.

When, in 1959, thousands of new comrades' courts came into existence, they had to operate at first in a legislative vacuum, since old statutes were clearly obsolete and new guidance was as yet unavailable. The RSFSR Ministry of Justice appears to have taken the lead in trying to fill this vacuum; during the summer of 1959 it prepared and distributed for professional study a number of draft statutes which could have been enacted into law for each of the different types of comrades' courts: in factories, urban-housing areas, schools, kolkhozes, and the like.[32] The view that a single statute should cover all types soon became dominant and by late 1959 the jurists reached general agreement on its contents. This document was published in October 1959 as an all-Union "Draft Model Statute on Comrades' Courts" on which public discussion was solicited.[33]

Although it was never enacted, this draft statute at least provided a source of guidance for those comrades' courts already in existence and encouraged the development of new ones. The draft model is also noteworthy as the only legislative document devoted to comrades' courts which proposed that their jurisdiction should extend to cases of persons who "avoid socially useful work and lead a parasitic way of life."

Even after its publication, however, doubts persisted at various levels about the authoritative quality of the draft model statute. The chairman of a village social court in Siberia inquired by letter in mid-1960 if it was proper to base the conduct of his court entirely upon it. In a public reply, N. Prusakov, the RSFSR Deputy Minister of Justice advised the comrades' courts to "be guided above all by the directives of the 21st Party Congress, by the demands of life itself, by the principles set forth in the draft model statute, and by socialist law consciousness."[34] This formula was not so fatuous as it was the product of caution: at the time officials showed increasing disappointment in the results of experiments with "public participation" and the milder penal policy. The pendulum was poised for a swing in the opposite

[31] Particularly the resolution on criminal punishment of the USSR Supreme Court on June 19, 1959, *Biulleten Verkhovnovo Suda SSSR*, No. 4, 1959, and the Procurator-General's Order No. 43 of July 20, 1959, *Sotsialisticheskaia zakonnost*, No. 9, 1959, pp. 16-19.
[32] *Cf.*, V. Chavchich, *Izvestia*, July 29, 1959.
[33] *Izvestia*, Oct. 24, 1959.
[34] *Sovetskaia Rossiia*, Aug. 16, 1960.

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direction and a vast new propaganda campaign against parasitic elements was about to begin.[35] The choice between comrades' courts and harsh anti-parasite laws was once more made an open question.

When the second wave of anti-parasite laws appeared some observers were led to the incorrect, though natural, inference that for the time being no further legislative development of comrades' courts could be expected, and that they would be quietly laid on the shelf if, indeed, the experiment itself was not completely abandoned.[36] There was, therefore, considerable surprise when, on July 3, 1961, the RSFSR adopted a decree which for the first time in thirty years gave valid force to new general statute on comrades' courts.[37] Within a few months all the other republics duly repeated the RSFSR action.[38]

With this it became clear that the two institutions were viewed as coexisting, not as exclusive alternatives. The purpose was not to have them coalesce, or to have one overshadow the other but rather to define their juridical nature in so distinctive a manner as to allow them to operate side by side. This did not preclude an area of overlap between the two institutions in regard to individual cases, or the possibility that one might be utilized more prominently than the other at different periods. The latter has in fact happened, as evidenced by the fact that for the past four years the anti-parasite law has come under increasingly sharper criticism, whereas the official posture toward comrades' courts has become more favorable. In comparison to the proposal under the all-Union draft model statute of October 1959, the niggardly RSFSR statute of July 1961 had shorn the comrades' courts of a major part of their competence and power to penalize. Yet virtually all these prerogatives (except jurisdiction over parasitism) have been restored to the comrades' courts by amendments to the RSFSR statute in October 1963.[39] Since 1961, therefore, the two institutions have become separate entities in Soviet legal thought.

The Road to Non-Law

Law in Soviet legal theory is always functionally dynamic. The purpose of law is to change men and, as it fulfills this function, to undergo qualitative change itself. An article of faith espoused by Soviet jurists today maintains that the realm of Soviet criminal law is experiencing a process of gradual shrinkage as a consequence of the steady decrease of criminality in the country. According to one scholar, this process has assumed the following three forms: 1) the reclassification downward from felony to misdemeanor of certain types of offenses, 2) the reduction in the severity of some criminal-law penalties, and 3) the expansion of the number of criminal cases in which the principle of "alternative jurisdiction" may be applied.[40] The last of these refers to those articles of the criminal codes which authorize the court to terminate judicial proceedings in a given case and to transfer the whole matter to a non-juridical "social" body for the application of measures of social influence."[41]

A similar shrinking process is said to be at work in all types of misdemeanors and violations of ordinances enacted by local government organs—a general area of law which Soviet terminology refers to as "liability under administrative procedures."[42] The main punitive sanction for these offenses is a monetary fine and the penalizing authority is normally an administrative agency or the militia; the shrinkage has taken the form of lowering the maximum limits on fines and reducing the number of state agencies authorized to levy them.[43] Instead of dismissing the cases outright, however, the administrative authorities are encouraged to transfer more cases of violation to the offender's *kollektiv* with the recommendation that appropriate "measures of social influence" be taken. Thus, in various practical ways a trend can be seen at work even today in Soviet

[35] Confirmed by a new USSR Supreme Court resolution on Sept. 17, 1960, protesting that excessive mildness "has created among certain unstable elements the attitude that punishment does not exist and this has contributed to a considerable degree in the committing of new crimes," *Biulleten Verkhovnovo Suda SSSR*, No. 6, 1960.

[36] Even RSFSR Deputy Minister of Justice Prusakov thought adoption of a new statute unlikely. *Cf.*, *Trud*, Jan. 7, 1961.

[37] *Vedomosti RSFSR*, 1961, No. 26, item 371.

[38] All republics had enacted similar statutes by the end of 1961 with the exception of the Turkmen SSR which did so on May 3, 1962.

[39] *Vedomosti RSFSR*, 1963, No. 43, item 750; *Izvestia*, Oct. 25, 1963.

[40] N. F. Kuznetsova, *Sovetskoe gossudarstvo i pravo*, Moscow (henceforth cited as SGP), 1964, No. 7, pp. 55-60.

[41] This is true of fourteen articles of the RSFSR Criminal Code.

[42] *Cf.*, O. M. Iakuba, *Pravovedenie*, Moscow, 1964, No. 3, pp. 54-61.

[43] *Vedomosti SSSR*, 1961, No. 35, item 368; *Vedomosti RSFSR*, 1962, No. 9, item 121.

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society toward restriction of the types of antisocial acts covered by legal regulation and enforced by agencies of the state. Even though there have been serious reversals of this trend (*e.g.*, the reintroduction of the death penalty, the increased severity of punitive measures, etc.), they have been interpreted by Soviet theorists as normal and temporary setbacks in a long-range historical process which is both natural and inevitable.[44]

Furthermore, with the contraction of the juridical sphere as a whole, the theory is that legal rules will undergo a qualitative transformation into non-juridical moral standards. This in turn will lead to a concomitant expansion of the sphere of behavioral norms and habits identified in Soviet literature as "rules of socialist community life" (see diagram).[45] Looking still farther down the path of human history, one can foresee the ultimate disappearance of formal laws altogether, along with the state organs of compulsion which enforce them. What will remain will be only "rules of Communist community life" which require no enforcement other than group opinion and suasion; law will no longer be written in books because it will have long since become written in the heart of "Communist man." [46]

The organizational aspect of this collectivist ideal hinges crucially upon the basic social unit called the *kolletiv*.[47] Whatever forms the *kollektiv* may take in distant Communist society, from time to time the need will probably arise to deal with individual cases of deviation from group behavioral standards: an elective standing committee of the *kollektiv* would handle the preliminary details, and, if necessary, convoke the whole membership to help persuade the prodigal son back onto the proper path.

Theories vs. Realities

Returning once more to the 20th century, we find that the comrades' courts bear only superficial resemblance to this ultimate ideal. For one thing, objections are being raised by various Soviet lawyers because the punitive powers of these courts include the right to levy fines of up to ten rubles, a material penalty which contradicts the purely psychological sanctions implicit in the notion of "measures of social influence" (public reprimands, motions of censure, demands for a public apology, and warnings).[48] In addition to the fairly innocuous levying of fines, a more serious problem is posed by the powers these bodies have to make official representation to state agencies. Their recommendations could lead to an offender's eviction from his premises, loss of the custody of his children, dismissal from work, and so forth. Under these circumstances there is room for mischief; and the fact that such serious penalties are imposed within the purview of the legal system does not guarantee the rectification of errors.

The present comrades' court appears even further at odds with the future ideal when attention is turned to the range of cases put within its competence by existing statutes. To be sure these include some matters of a purely moral nature which could be described as infractions of the "rules of socialist community life" rather than law violations. Nevertheless, at the present time a truly impressive array of offenses can find their way to trial in a comrades' court. In addition to the specific criminal cases already mentioned, all the republican criminal codes contain a special article on comrades' court. In most of these the presiding judge is authorized to transfer at his discretion any case in which the "crime is of small significance and from the nature of the act and the personality of the accused it appears likely that the accused can be reformed by the application of measures of social influence." [49] Original jurisdiction over civil suits involving small sums may be exercised by a comrades' court with the mutual consent of the parties, and an even wider range of civil-law matters may be referred by a people's court for consideration by the comrades' court.[50] In short, through statutes, Soviet legal practice has converted the comrades' courts into a basic element in the administration of justice, and the prerogatives of the institution can now be defined by reference to the regular law codes.

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[44] *Cf.*, I. S. Samoshchenko, *Poniatie pravonarusheniia po sovetskomu zakonodatelstvu*, Moscow, 1963, No. 84, pp. 66-67.

[45] For an attempt at exact definition of the concept see Iu. A. Sokolov, *Uchastie trudiashchikhsia v okhrane sovetskovo obshchestvennovo poriadka*, Moscow, 1962, pp. 10-12. Also A. I. Veinberg, *SGP*, 1963, No. 12, p. 153.

[46] See the CPSU Party Program, *XXII sezd KPSS*, Vol. III, p. 308.

[47] "A *kollektiv* is a combination of people united by identical aims; in particular, an association of people linked together by regular mutual work or activity. . . ." *Slovar inostrannykh slov*, Moscow, 1955, p. 332.

[48] N. Prusakov, *Trud*, Mar. 29, 1962; M. Khotkevich, *Biulleten Ispolkoma Moskovskovo Gorodskovo Soveta Deputatov Trudiashchikhsia*, 1961 (July), No. 13.

[49] *RSFSR Criminal Code*, art. 51.

[50] *Cf.*, *Sovetskaia yustitsiia*, 1961, No. 16, p. 5; P.E. Orlovskii, *Vestnik Moskovskovo Universiteta*, 1960, Series 10, No. 2; D. F. Kichatov, *SGP*, 1961, No. 12, pp. 77-78.

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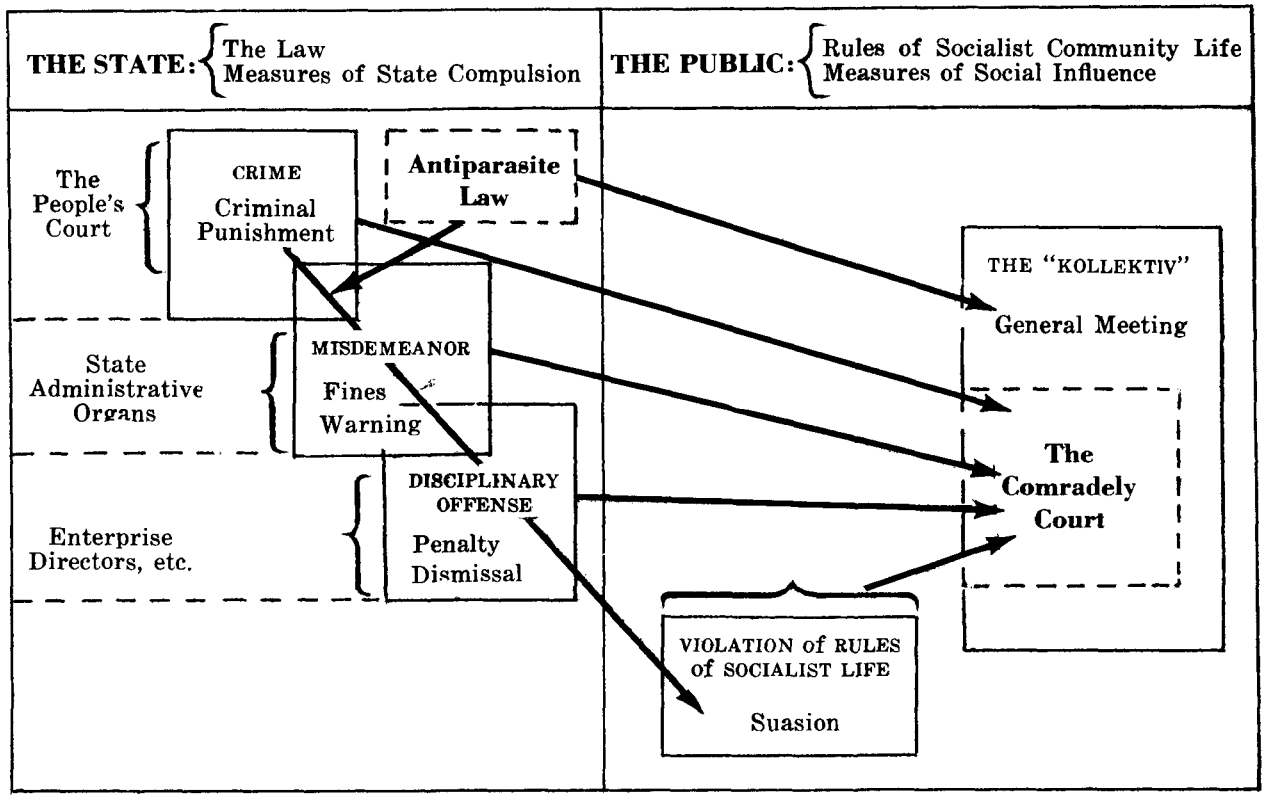

Comradely Courts and Antiparasite Law in the Soviet Legal System
A Baedeker to the Future of Soviet State and Law

Since 1959 the comrades' courts have been the object of a steady and uniform process of assimilation into the Soviet legal system, notwithstanding the fluctuating attitudes of party officialdom toward the institution. For reasons which are not completely clear, Soviet jurists themselves have been the inspirers and architects of this development and their voluminous writings on the topic in recent years all assume that the comrades' courts are a permanent feature of Soviet public life and political structure. Thus, the future of the comrades' court as a Soviet institution looks rather bright, if not yet entirely secure. Its statutes will doubtless be subject to further amendment,[51] and the extent of its practical operation will continue to depend upon the political emphasis of the moment. That the institution could not be entirely extirpated from the Soviet legal system without a thorough reworking of numerous codes of law stands as a formidable barrier and deterrent to its total abolition. As to whether the institution of comrades' courts is a just one, one might perhaps say that as long as one disregards such "bourgeois prejudices" as the right to privacy or non-conformity, and assuming a stable climate of legality (which is hardly the case today), there is nothing *inherently* wicked or unjust in it. Indeed the attempts to bring the comrades' courts in line with the existing law codes might even be described as a step in the right direction.

An entirely different picture, however, is presented by the anti-parasite law. The anti-parasite law cannot be made compatible either with the Soviet legal system or with the vision of the Communist future (see diagram). In the legal sphere the sentence of exile for terms of up to five years is a criminal punishment in the full sense of the word, and no one in the USSR seriously argues to the contrary, despite

[51] Since these lines were written, for example, an RSFSR decree dated January 16, 1965, designed to impose heavier monetary fines for petty thefts of state and public property, has amended the Statute on Comrades' Courts so that they are authorized to levy fines of up to 30 rubles for this offense and up to 50 rubles for a repetition of the offense. It also moves petty theft of state and public property to the top of the list of "criminal" cases within the purview of comrades' courts. *Vedomosti RSFSR*, No. 4, 1965, item 83.

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the circumlocutions in the decree which make it possible to avoid the use of the word exile (*ssylka*). Yet parasitism is not a criminal charge and the accused sent into exile does not acquire a criminal record. Nevertheless, in the majority of cases, the trial of parasites is conducted before a regular state court, with the essential difference that normal rules of criminal trial procedure are suspended (because parasitism is not a "crime"). Pressed to find a suitable definition for this legal oddity, the best that Soviet lawyers have been able to say is that the anti-parasite law constitutes a "special type of administrative influence." [52]

This ambiguous phrase may be interpreted as summary justice, which is not foreign to Soviet judicial practice: since 1956 simplified trial procedure has been introduced to deal with cases of petty hooliganism (mainly public drunkeness) and minor black-market cases.[53] However, there can be no comparison between the anti-parasite law and the simplified trial procedure since the maximum penalty under the latter is a jail sentence of fifteen days. Moreover, such cases are heard by a single (professional) judge, whereas anti-parasite cases are tried before a panel consisting of a judge and two lay assessors, as in normal criminal trials. With respect to the parasite trials conducted by a *kollektiv* with no recourse to the regular judiciary, Soviet legal literature seems to take the attitude that the less said about it the better.

The juridical situation with the anti-parasite law is not, however, all that bleak or hopeless. In their own unspectacular ways, influential members of the Soviet legal profession have prevented the trials of "parasitic elements" from becoming an instrument of uncontrolled massive repression. They have tried to channel most parasite cases into the courts rather than to non-judicial bodies. Legal minds at the Supreme Court level have succeeded in introducing more and more of the conventional rules of criminal trial procedure into the parasite trials,[54] and some have gone so far as to argue that the criminal procedure code in its entirety should apply to these cases.[55] Moreover, Soviet jurists who have written about the anti-parasite law since 1961 have become increasingly insistent upon the strict observance of normal standards of critical judgment in hearing evidence, assigning motives, and granting the benefit of the doubt to the accused.[56] The press has also played a role in exposing occasional cases of flagrant misuse of the anti-parasite law.[57]

Keeping this in mind, one might speculate that the life-expectancy of the anti-parasite law is not long. There is much working against it. This prospect does not make its past and present use in thousands of cases more palatable, nor does it rule out future individual instances of elementary injustice, such as the case of the poet Brodsky which has attracted wide attention in the West. Furthermore, there are no grounds for thinking that the demise of the anti-parasite law is imminent. It is not improbable that new legislation will soon appear to set up special places of confinement and compulsory work for those persons already sent into exile under this law (a move frequently suggested by the press, which has complained that the transplanted parasites have too good a life at their exile locations).

From the long-range and juridical point of view, however, it would seem that either the anti-parasite law is inevitably destined to be fully incorporated into Soviet criminal law—in which case the "social sentence" notion is lost—or that it will be repealed outright. Which of these two courses the more liberal Soviet lawyers would prefer can hardly be a matter of doubt since parasitism by definition does not offer the "elements of a crime" which substantive criminal law presupposes. Parasitism is, in fact, a political rather than juridical concept. Even the non-lawyer Communist ideologist would find it difficult to justify the existence of anti-parasite laws in the idyllic Communist society—for aren't parasites an "insignificantly small" and vanishing breed representing "the last refuge on Soviet soil of foreign morals and ideology"? [58] Yet the existence of norms and institutions that are in horrendous contradiction to the more utopian aspects of Leninist ideology could hardly be considered a novelty in the USSR. Whether the anti-parasite laws belong in this category only time will tell.

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[52] *Cf.*, N. P. Farberov and P. S. Romashkin in *Teoriia gosudarstva i prava*, Moscow, 1962, p. 494.

[53] *Vedomosti RSFSR*, 1961, No. 16, item 246; *ibid.*, No. 18, item 274.

[54] *Cf.*, guiding instructions given by the USSR Supreme Court in September 1961, *Biulleten Verkhovnovo Suda SSSR*, 1961, No. 6, and in March 1963, *ibid.*, 1963, No. 3.

[55] *Biulleten Verkhovnovo Suda RSFSR*, 1963, No. 2, p. 2.

[56] Cf. I. D. Perlov, *Sud i obshchestvennost v borbe s tuneiadtsami*, Moscow, 1962; A. S. Shliapochnikov, *SGP*, 1963, No. 9, p. 47.

[57] In one notorious case, a Ukrainian girl was exiled on the basis of false accusations sent in an anonymous letter to the militia by a neighbor who hoped to get the girl's apartment, *Izvestia*, Feb. 21, 1962.

[58] *Cf.*, L. F. Ilichev's report to the "ideological" Central Committee plenum in *Pravda*, June 19, 1964.

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The Worker

By Anne Kahl

Soviet labor legislation is extensive and detailed, for it governs virtually every aspect of the employment relationship and, in addition, the overall distribution of the Soviet labor force by industry, occupation, and geographic region. Labor law is a powerful instrument for implementing the nation's economic plans, and protection of the worker's interest is decidedly of secondary importance. Conflicts between the demands of the economy and the workers' legal rights are almost invariably resolved at the worker's expense.

This has been so from the early period of Soviet rule. Within a few days of the Bolshevik seizure of power, the new government issued a decree (of October 29, 1917) which was epoch-making in the protection it promised Russian workers: the 8-hour day and 48-hour week were established; night work, overtime, and work underground were abolished for women and children; and the employment of children under 14 was forbidden altogether. This highly commendable legislation was no sooner issued than withdrawn, however. The government, staggering to cope with economic crisis and civil war, found it impossible to maintain the new hours law. A similar fate befell two other 1917 decrees, respectively on unemployment compensation and on health insurance. These, like many other protective labor laws of the early years—notably the 1918 Labor Code of the RSFSR—remained for the most part ideals and unfulfilled promises, while the government's actual labor policy was shaped by military demands.

The political and economic chaos of this period brought about a steady deterioration in the position of the worker. Unemployment was particularly serious: factories were idle because of the lack of supplies and the disruption of transport, and thousands were thrown out of work. Galloping inflation led to a drop in real wages, and workers were able to buy less and less with their earnings. The government made the situation even less tolerable by its attempt to increase labor productivity, which was at a catastrophically low level, through a severe tightening of labor discipline. Thus as early as 1918 the pattern was established: Soviet labor legislation henceforth was directed toward increasing production and productivity rather than toward improving the worker's economic status and enhancing his dignity.

Labor conscription, which was to be one of the harshest labor control measures of the Stalin era, was introduced only a few years after the October Revolution. The principle was formally established in December 1918, in Article I of the 1918 Labor Code of the RSFSR, which in-

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troduced the obligation to work for all able-bodied citizens between the ages of 15 and 50. In January 1920, a decree on general labor service was issued. It provided for the conscription of the entire able-bodied population to perform work in addition to regular employment, for the compulsory transfer of skilled workers in the military or in agriculture to state industrial enterprises, and for the distribution of labor in general according to the need of the economy. It can be inferred from later legislation that penalties for "labor desertion" (evasion of the call-up, leaving a job without permission, absenteeism, and so forth) included imprisonment from the start.

Another uniquely Soviet labor practice which was much-abused under Stalin had its origins in the early period of War Communism. This was the "volunteer" movement, initially sparked by dedicated working people and Communists who could not be spared from industry to go to the front and who therefore started a drive to encourage unpaid work on Saturdays. Very quickly the *subbotniki* (from the word *subbota* —Saturday) movement was taken over entirely by the party, which issued rules and regulations, possible exemptions, and so forth, and deprived the movement of its voluntary and spontaneous character. Not until the first Five-Year Plan, however, did the movement take on major proportions.

The introduction of the New Economic Policy in 1921 effected only a slight change in the Russian workers' situation. Trade unions were granted the right to bargain collectively for higher wages and better conditions of work than those guaranteed as a minimum by the state, but this change in the law did not bring about a substantial improvement.

The NEP period did produce a new labor code, however, prompted by the desperate need for clarification and revision of the body of labor legislation that had grown up since 1917, and for new provisions to regulate the small-scale private ownership permitted under NEP. This measure—the 1922 Labor Code of the RSFSR—included several new sections on the engagement of labor on a voluntary basis, on collective agreements, on trade unions, and on social insurance. Technically, the Code is still in effect today, although it is so thickly encrusted with amendments that it bears little resemblance to the document adopted in 1912.

Up to 1928, Soviet leaders tried to maintain a precarious balance between measures to increase labor productivity and measures to improve living and working conditions. But with the inauguration of the plan era, virtually all consideration for improving the lot of the worker disappeared, not to be resumed until the early 1950's. Compulsion and pressure on the working class increased markedly in the 1930's, as the industrialization drive got underway, and on into the 1940's, during and after World War II. Labor conscription took on massive proportions as millions of peasants were drawn into construction work and other unskilled occupations. In 1940, conscription was extended to rural youth, and all workers were "frozen to their jobs" by legislation which made unauthorized quitting a criminal offense.

During the same period, the Ministry of Labor was abolished (1933) and its functions taken over by the trade union confederation, which by this time could lay little claim to representing the workers' interest. Collective bargaining was abandoned in the mid-1930's. Although the practice of drawing up collective agreements was resumed in 1947, it was essentially a formality for propaganda purposes: conclusion of the annual "agreement" has since been used mainly to publicize the goals of the annual economic plan.

Post-Stalin Reforms

Since the mid-1950's, there has been a serious attempt to ameliorate and systematize Soviet labor legislation. Laws have been issued which soften or eliminate altogether the harsher aspects of the labor legislation promulgated in the 1930's and 1940's. Other measures taken since 1956 have sought to introduce greater order and rationality in such areas as wages, hours, and the settling of disputes.

Perhaps the single most important change has been in the area of labor mobility and voluntarism in the choice of work.

An edict of June 26, 1940, which made quitting without management's permission a criminal offense, punishable by two to four months' imprisonment, was repealed in part by an unpublished decree of July 14, 1951, and was repealed altogether by a decree of April 25, 1956. The 1956 decree abolished several other restrictive laws, including an October 1940 decree on the compulsory transfer of skilled workers from one locality to another, and a June 1945 decree prohibiting certain skilled workers in agriculture from leaving their jobs.

Since 1956, Soviet workers have been free, with some exceptions, to quit their jobs upon giving two weeks' notice. Persons who cannot

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lawfully leave on short notice include workers recruited by Orgnabor, who have signed one to three-year contracts for employment in the North or the Far East; skilled and semiskilled workers graduating from vocational-technical schools, who are assigned jobs two to four years, mostly in agriculture; and university graduates and other "young specialists," nearly all of whom are assigned to jobs for the first three years after graduation. A significant number of graduates and specialists succeed in evading their work assignments—usually through good connections, but sometimes by forging documents. The government attempted to ensure compliance by issuing a decree in May 1963 which provides for a one-year delay in granting diplomas to graduates of higher educational institutions; the diploma is conferred only after the graduate's first year at his assigned job.

Having loosed the legal restrictions binding the workers, the Soviet authorities now rely principally upon material incentives and certain indirect controls to implement the government's manpower policy.

The social security system is utilized to induce workers to take up dangerous or arduous jobs, to seek employment in otherwise unattractive localities, to remain in steady employment with a single enterprise, and to join the trade unions (which can bring various pressures to bear on members). The amount of social insurance benefits varies for individuals with identical earnings in different occupations, industries, or localities, and also for union and non-union members.

The amount of sick pay which a worker receives depends upon the length of time he has been employed in a particular enterprise and upon his membership in the trade union. Benefits are cut in half for workers who do not belong to the union. Union members who have worked in the same enterprise for less than three years receive 50 percent of their average earnings during illness; the rate increases according to length of service, up to 90 percent for workers who have been in the same enterprise for 12 years or more. From 1938 until 1960, a worker who left his job without management's permission could claim no sickness benefits at all until he had worked for six months in a new job. The six-month waiting period was abolished, however, by a decree of January 25, 1960.

Other controls which act indirectly to limit freedom to change jobs include the requirement that a job applicant submit his workbook and internal passport to a prospective employer. The work-book contains information on all previous jobs, states the circumstances under which the applicant left each job, and presumably encourages employers to reject applicants who have moved about frequently. Some workers are inhibited from moving to new jobs because the change would entail loss of an apartment (housing rights often being based on seniority in a job) or possible loss of a plot of land (allocated by some enterprises for cultivation by the workers to supplement the family food supply).

Wages and Hours

Such curbs notwithstanding, the restoration of the workers' legal right to seek jobs where they choose made a reform of the wage system urgently necessary. This task was begun in 1956 and virtually completed by 1962. Prior to 1956, there was no central authority responsible for wages in the USSR. Each of the economic ministries devised its own wage system, and was solely responsible for applying it to the enterprises which it supervised. The multiplicity of wage systems led to great inequality in pay for equal work. When direct labor market controls were removed and workers were again free to make job choices in terms of the wages offered, the deficiencies of the multiple wage system as a mechanism for allocating labor became immediately apparent. Enterprises competed ferociously for workers with skills in short supply and manipulated the wage scales issued by the economic ministries in order to attract and hold needed workers.

The job of setting up a more equitable wage system fell mainly to the State Committee on Questions of Labor and Wages, created in 1955. Under its direction new wage scales were fixed for each industrial branch, incorporating a minimum wage fixed by law in 1956 and later increases advocated by the party in 1959.

The wage reform was linked with a reduction in the workweek. Under a law of 1940, an 8-hour workday and 48-hour workweek had been in effect. In 1956 a seven-hour day was introduced in selected branches of the economy, and by a law of May 7, 1960, the reduction was extended to all wage and salary earners. The workweek now totals 41 hours, consisting of five seven-hour days, plus 6 hours on Saturdays (and on days preceding holidays). Plans announced in 1959 to reduce working hours still further (to 40 hours a week in 1962 and to 35 hours a week in 1964) have apparently been shelved, since official statements no longer allude to them.

The legal limits on work hours and overtime are frequently ignored, however. According to

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Art. 104 of the Labor Code of the RSFSR, overtime may be ordered only in exceptional circumstances and with trade union approval, but evidence suggests that the Soviet workers' rights in this respect have been flagrantly abused. A few years ago a press campaign exposed numerous instances of managers' demanding overtime in excess of the legal maximum, ordering work on Sundays and holidays, and refusing to pay even base wages for the extra hours worked. In consequence, the All-Union Central Council of Trade Unions adopted a resolution in 1962 condemning illegal demands for overtime in factories and at construction sites. But it is not likely that the resolution will have much effect: when management is under the pressure of a tight production schedule, the trade union has little choice but to acquiesce to the demand for extra hours of work.

Work Rules

A decision of January 12, 1957, establishing work rules within factories and offices has contributed significantly to current Soviet labor law. The model work rules regulate hiring and dismissal procedures; establish factory regulations on signing in and out, wearing safety clothing, and keeping the work-place in order; and, most important, regulate labor discipline.

The term "labor discipline" refers broadly to work habits: punctuality, conscientiousness, neatness and responsibility. In the Soviet system more than most, the government relies heavily on restraints and sanctions on the one hand, and on honors and awards on the other, to promote labor discipline—and thereby to promote production. The draconic laws governing discipline in the 1930's and 1940's have been replaced in part because of the post-Stalin "return to socialist legality," but also because the Soviet labor force today is more skilled, more settled, and more accustomed to living and working under pressures of modern industrial life. Nonetheless, strict emphasis on labor discipline is still characteristic of the Soviet scene, and the 1957 work rules spell out in fine detail the attributes of an "honest and conscientious" Soviet worker. According to Art. 10 of the rules, labor discipline requires the worker to get to his job on time; put in a full day's work; carry out his supervisor's instructions promptly and accurately; fulfill his work quota and try to overfulfill it; permit no waste; take proper care of machines, tools, and materials; and keep his working place clean. Failure to observe these rules may entail one of the standard penalties for violation of labor discipline, ranging from warning, reprimand, and severe reprimand, through demotion for up to three months. In cases of a persistent breach of labor discipline, or of absence from work without valid reason, management may dismiss a worker. Rather than do so, however, many factory directors turn the case over to the factory Comrades' Court.

Appeals and Grievances

A worker who wishes to challenge the fairness of a disciplinary penalty uses the appeals procedure established by a decree of January 31, 1957, on the settlement of labor disputes. The disputes-settling machinery set up by this decree replaces the Appraisal and Conflicts Commission (*Rastsenochno-Konfliktnaia Komissiia* —RKK) which had functioned for the previous 30 years, since 1928. The decree is of fundamental importance not only because it alters the grievance-handling machinery in a way that is considerably more favorable to the worker, but because it specifies anew the matters which may formally be protested.

As in the past, workers are powerless to challenge the laws on wages, hours, dismissal and tardiness; they may only question the fairness with which these laws are applied. Disputes that arise out of the application of rights set down in labor legislation, in the collective contract, in the individual work agreement, or in plant work rules, may be brought before Labor Disputes Boards (set up in each plant in 1957), before the civil courts, or before higher administrative agencies.

Grievances heard by the Labor Disputes Boards, which are composed of both trade union and management representatives, arise most frequently out of dismissal orders; disciplinary penalties; application of wage rates or output standards; and other alleged abuses by management of workers' legal rights. Illegal discharge is probably the principal type of grievance handled by the Boards, although it is hard to gauge their effectiveness in this respect. Since 1958, dismissals ordered by management have required the prior approval of the trade union, but according to press reports management has frequently ignored this proviso. Moreover, trade unions have in some cases granted their approval even though there is no legal basis for dismissal. (The grounds for management- ordered dismissal are listed in Art. 47 of the Labor Code of the RSFSR.)

On balance, however, the revision of the disputes-settling machinery has certainly strength-

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ened the position of the worker and the local trade union *vis-à-vis* plant directors. The 1957 law not only gave the Labor Disputes Boards authority to settle many disputes at the plant level, but also required that the decision of the boards and subsequent appeals be handled speedily. The broad intent of the reform was to achieve prompter and more effective handling of disputes within the enterprises where they arise. Under the former grievance system, appeal from decisions of the RKK was to higher trade union authorities (cases went all the way up to the central committees of individual unions, and sometimes to the AUCCTU) or to the courts. Today, appeal of a decision of a Labor Disputes Board is to the trade union organization within the plant, and then to the courts. The higher levels of the union structure no longer participate in the resolution of labor disputes, an arrangement which is probably beneficial to the workers' interests.

The authority of the trade union within the plant was further increased by a decree of July 15, 1958, on the role of the factory committee (the trade union organization at the plant level). This decree authorizes the factory committee to participate in drawing up draft production plans for the enterprise; to conclude the annual collective contract with management and check on its implementation; to participate with management in assigning workers to wage grades, revising output norms, and fixing bonuses; to call mass meetings for the purpose of eliciting suggestions on technical matters and production problems; to check on the enforcement of labor legislation; and to administer the state social insurance system (except for pension provisions) for workers in the plant. As mentioned, the 1958 decree also requires the consent of the factory committee to management's orders of overtime or dismissals, as well as to the hiring of persons under 16.

To sum up, the group of laws issued since the mid-1950's has produced some significant changes in the character of Soviet labor law. Administrative controls over manpower have been loosened and penalities for infringements of work rules lightened. The government has reformed the wage system, partly to improve living standards, but mostly to bring about a more efficient utilization of the USSR's scarce manpower resources. Although the trade unions remain in effect an arm of the party entrusted with stimulating production, an attempt has been made to increase their appeal to ordinary workers by emphasizing the unions' concern to implement workers' legal rights and to provide the welfare facilities promised in collective contracts.

Despite these desirable reforms, the essentially paternalistic nature of Soviet labor law remains much in evidence. The rights enjoyed by the Soviet worker are those granted him by the government; they may be extended or diminished without warning, and without the worker's consent. The regime's policy on hours of work is illustrative: the laws introducing the 41-hour week were enacted not because of worker or union demands, but because of a government decision that the shorter workweek was desirable and that the economy could support the change. Similarly, the regime's announced plans for a further reduction of hours were abandoned without any explanation—and without any visible response from the workers. The paternalism of Soviet labor law is also evident in the legislation on collective agreements. The admittedly "educational" purpose of these documents is stressed by Soviet authorities, who see them as a means of securing the agreement of labor and of management to work together to fulfill government-established targets.

Perhaps the best measure of the tenuousness

— Смотрите, Петров лежит! А я чуть было ему прогул не записал...

Рисунок И. СЕМЕНОВА

—Look, Petrov is resting! And I almost punished him for loafing! . . .

—*From* Krokodil (Moscow), *May 20, 1964.*

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of workers' rights has been the regime's failure to push forward an overall revision and liberalization of the long obsolete Labor Code of 1922. In October 1959 a draft of "Basic Principles of Labor Law of the USSR and the Union Republics" was published with fanfare. These Principles were to serve as a model for new labor codes in the various Soviet republics, replacing the 1922 Code still in effect. But after a period of public discussion in 1959, the Basic Principles were quietly shelved. The meager evidence available suggests that powerful opposition developed to their adoption, at least in the near future, because of what were considered to be overly liberal "concessions" to the workers.

The fate of the Basic Principles is not untypical. The government took a bold step forward in planning an overhaul of the 1922 Code and in publishing a draft with numerous liberal features—but then faltered and fell silent, leaving the document's future very much in doubt. Protection of the worker's interests seems clearly to have been sacrificed to political or economic considerations that have never been explained to the public. Under the authoritarian system of rule, no explanation is necessary.

The Peasant

By Alexander Kucherov

The Great Reform of 1861 in Russia, which freed the peasants from serfdom and allotted land to them to be used not as personal but as communal property, had two essential defects: the peasants received too little land and had to pay too much for it. In consequence, "more land" became the perennial craving of the Russian peasantry and a major goal of the revolutionary movement.

The slogan "The land belongs to those who till it," and the promise to partition it among the peasants, were of great, perhaps decisive, help to Lenin in the fight against the Provisional Government (which postponed the question of land distribution for the Constituent Assembly to-be), and later in the struggle to win the Civil War, in which the peasantry was alienated by the White generals' practice of returning land to the estate-owners in the provinces freed from Red forces.

But when the Bolsheviks seized power they did not apportion the land as promised. On the contrary, the Decree of the All-Russian Central Executive Committee "On the Socialization of the Land," issued January 27, 1918, provided that every form of ownership of land (including peasant holdings), as well as of mineral wealth, waters, forests, and all the natural resources within the boundaries of the RSFSR was abrogated forever.[1] At the same time the right to *use* the land was restricted to those who worked it by their own labor. The decree authorized three forms of land tenure—communal, cooperative and private—but gave priority to the

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[1] *Sobranie uzakonenii i rasporiazhenii pravitelstva RSFSR*, Moscow, 1918, item 215.

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first two forms "in order to build socialism as soon as possible."

The NEP period brought a temporary re-emphasis on private utilization of the land, legally expressed in the RSFSR Land Code of October 30, 1922.[2] While state ownership of the land was reaffirmed, the Code granted the peasants "perpetual tenure" on plots they were actually occupying and farming as of May 1922. Everything connected with the allotted plot—buildings, harvest, products, plants, etc.—remained the property of the tenant, who aslo had the right to use the land at his discretion, to erect new structures on it, or to use it for business or housing. However, the tenants could not mortgage, lease or sell their plots.

After the NEP was liquidated and industrialization launched by the First Five-Year Plan, Stalin undertook the reorganization of Soviet agriculture through forcible collectivization. Concerning the three existing forms of land tenure, his aim was to abolish the private sector *in toto* and to effect a mass conversion to the cooperative form of "tenancy"; the communal form was deemed unfeasible in light of the disastrous failure of efforts to achieve "instant communism" during the civil war period.

A decree of the Communist Party on January 5, 1930, announced the joint goals of collectivization and elimination of kulaks (well-to-do peasants); the ensuing drive lasted approximately six to eight years. By 1937, 18,500 peasant families, or 93 percent of all peasant households, were collectivized in 242,000 kolkhozes (collective farms). The peasants had to surrender to the kolkhozes not only the land transferred to them "in perpetuity" by the Land Code of 1922, but also their livestock, implements, and various other tangible assets.

On February 17, 1935, an "Exemplary Statute of the Agricultural Artel" (cooperative) was adopted by the Second All-Russian Congress of Shock Kolkhoz Members, and confirmed into law on the same day by joint decision of the Council of People's Commissars and the party Central Committee.[3] This statute remains the basic source of kolkhoz law up to the present time.

Rights and Duties of the Kolkhoz

The kolkhoz is an agricultural cooperative in possession of all the rights of a juridical entity. In this capacity it has the right to sign contracts and is materially responsible for their fulfillment. The People's Courts have jurisdiction over claims of kolkhozes against each other, or claims involving kolkhozes and other cooperatives, state agencies and organizations, or private persons, according to a joint government and party decree of August 27, 1937.

The function of the kolkhozes is to achieve agricultural output by collective means of production, including collective work of the members. Since the entire economic life of the Soviet Union is "established and directed by the state economic plan" (Art. 11 of the 1936 Constitution), the economic life of every kolkhoz is integrated into the overall plan. The plan prescribes all of the kolkhoz's agricultural activity, establishing beforehand the exact quantity of output it has to produce. The risk of unfavorable weather and bad crops remains with the kolkhozes.

The "right" of citizens to unite in kolkhozes is expressed in the Constitution (Art. 126). The Exemplary Statute states more specifically that a kolkhoz is formed by the "voluntary" union of peasants into an agricultural cooperative, "in order to organize a collective, that is, public, economy."[4] Merged are the work, most livestock and all agricultural implements of the uniting peasants, as well as seed reserves, fodder for the collective livestock, farm structures necessary to support the cooperative economy, and any enterprises for the processing af agricultural products (Art. 1). Items remaining in the possession of individual households are dwelling constructions, personal livestock and poultry, and the structures necessary for maintaining such livestock (Art. 4).

Membership in a kolkhoz is open to all working men and women 16 years of age or older. The new member must surrender to the collective the items enumerated in Art. 1 of the Statute and pay membership dues of 20-40 rubles depending on the size of his household. These dues are allocated to an "indivisible fund."

According to Art. 8 of the Constitution, "the land occupied by collective farms is secured to them for their use free of charge and for an unlimited time, that is, in perpetuity." The state thus retained ownership of the land, transferring tenure to the kolkhozes and awarding them as "common socialist property" the public enterprises, livestock, agricultural implements, agricultural products, and common buildings on the land (Art. 7).

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[2] *Ibid*, 1922, item 409.
[3] *Sobranie zakonov SSSR*, Moscow, 1935, item 82.
[4] "Voluntary" collectivization, it might be noted, cost the lives of about 6,000,000 peasants who perished in concentration camps or starved to death; it also caused the loss of 50 percent of the country's livestock, slaughtered by peasants unwilling to surrender it.

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Two forms of "socialist property" are recognized in the USSR: state property (the possession of the whole people) and collective farm property (belonging to individual collectives). Why both are labeled "socialist property" is a peculiarity of the Soviet Constitution, since real socialist property, according to Marxist doctrine, belongs to the state. It was Lenin who promoted cooperative property to socialist property in his pamphlet "On Cooperatives" written in 1923, after it had proved impossible to socialize all industry and agriculture. Still, kolkhoz property is considered a kind of second-grade socialist property, which is to be raised to public property when agriculture is finally communized.

Besides the property enumerated in Art. 7 of the Constitution, an important part of the kolkhoz's possession is the indivisible fund. One-quarter to one-half of the value of the entire collective property of the kolkhoz members, as well as 10 to 20 percent of the annual money income of the kolkhoz, is transferred to this fund. Initially it was created for the acquisition or financing of small machinery, cattle, new construction, and capital investments. Since March 1958, when the machine-tractor stations were abolished, it has also been used for the purchase of heavier farm machinery. In case of the voluntary transfer of a kolkhoz member to another kolkhoz, or his shift to another branch of the economy, or his obligatory separation from the kolkhoz, the value of his share is reimbursed to him—but not the part of his former property assigned to the indivisible fund.

Kolkhoz property is legally protected on the same basis as state property. By a law of 1932, enforced until 1947, the death penalty could be invoked as maximum punishment for the misappropriation of public property (including kolkhoz property).[5] In the latter year the death penalty was abolished, but the possible term of imprisonment for the pillage of state property was increased.[6] According to a decree of May 5, 1961, capital punishment is again applicable to the theft of public property "in especially large amounts."[7]

While the output of a kolkhoz is legally its property, it must of course fulfill its quota of deliveries to the state at fixed prices. However, the kolkhoz has the right to sell whatever remains of its production on the free market, at much higher prices that are determined by the "capitalistic law" of supply and demand.

On paper, a kolkhoz is administered democratically. "The affairs of the kolkhoz are managed by a General Assembly of its members and, in the time between General Assemblies, by a Board elected by the General Assembly," reads Article 19 of the Exemplary Statute. The Board consists of five to nine members, depending on the size of the kolkhoz. The General Assembly also elects a Chairman of the Kolkhoz (who is simultaneously Chairman of the Board) and an Auditing Commission. The Chairman has a Deputy, nominated by himself from among the members of the Board and elected by the General Assembly. According to the Statute, the duties of the Chairman are to direct the daily work of the kolkhoz and its brigades and to implement the General Assembly's decisions.

So much for the paper provisions. In reality, kolkhoz elections are conducted in the same manner as all other elections in the Soviet Union: a single candidate is chosen by the party for each position and then "approved" by the General Assembly. The Chairman, not the General Assembly, runs the kolkhoz. Such control is wholly necessary in the Soviet view, but it has discouraged observance of even the outward trappings of democratic kolkhoz administration. The regime wants to preserve control—but also appearances. As far back as 1946, evidence of a flagrant disregard of the statutory provisions on kolkhoz management prompted a joint decision of the USSR Council of Ministers and the party Central Committee "On Measures for the Liquidation of Violations of the Agricultural Cooperative Statute" (September 19, 1946). This decree cited appalling violations of the Statute's provisions. It was revealed that in a great number of kolkhozes, General Assemblies never took place, and that the kolkhoz members were thus prevented from any participation whatsoever in management of the collectives. All the most important questions of kolkhoz life, including the distribution of income, the implementation of economic plans, and the priority of expenditures, were settled exclusively by the Chairman and the Boards without any accounting to the General Assemblies.

The principle of elective confirmation of officials had also been ignored. In a great number of kolkhozes electoral General Assemblies had not been convoked for several years. Things had reached the point where kolkhoz chairmen were simply appointed and removed by local party and Soviet organizations without the knowledge of the kolkhozes involved. This situation left the chairmen with little feeling of

[5] *Sobranie zakonov SSSR*, 1932, item 360.
[6] *Vedomosti Verkhovnovo Sovet SSSR*, No. 19, 1947.
[7] *Ibid.*, No. 19, 1961.

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responsibility toward the kolkhoz members, with whom their contact was limited.

The prohibition of these violations in the 1946 decree apparently had little permanent effect. In recent years the Soviet press and literature have been flooded with complaints about violations of the kolkhoz Statute. For instance, in a letter to N. S. Khrushchev, members of the kolkhoz "Dneper," Cherkasski Region and District, complained that the District Party Committee had appointed as Chairman a certain Oleynik against the will of the kolkhoz members.[8] In the kolkhoz "Kommunist," Zarayskii District, Moscow Region, N. V. Molokov was removed as Chairman by the General Assembly because of disastrous management, but was reinstalled by the district Soviet against the categorical will of the kolkhoz members.[9] At a Plenum of the party Central Committee in 1959, N. S. Khrushchev read a letter from members of the kolkhoz "Leninskoe znamia," Dmitrovski District, Orlovsky Region, complaining that the Regional Soviet had removed the Chairman, S. N. Fak, without taking into account the expressed desire of the kolkhozniks to keep Fak in office.[10]

[8] *Pravda*, Feb. 1, 1961.
[9] *Ibid.*
[10] Speech to the Central Committee Plenum, Dec. 25, 1959: *Stenograficheskii otchet*, Moscow, 1960, p. 391.

The One Candidate

. . . .It is necessary to ensure the broadest discussion, both at meetings and in the press, of the personal and business qualities of the candidates. It has been known to happen in some places that pre-election meetings have been hastily run and a businesslike discussion of candidates has been replaced by ostentatious fanfare. It is important not to permit a repetition of such shortcomings. It is necessary to discuss the candidates in a quiet, comradely atmosphere at workers' meetings in the shops and at collective farmers' brigade meetings, to confer and to arrive at a common opinion about the comrades, and only then to nominate the one candidate at a general meeting of the collective. And here everything must proceed not like a ceremonial rally but in an atmosphere of free, comradely discussion. . . .

—From editorial in *Izvestia*, Feb. 7, 1965.

In theory the kolkhozes are supposed to administer their own economies under the general "direction" and "instructions" of the state. In reality, such "direction" and "instruction" completely curtail their independence. It is evident that the regime wants to eliminate the most flagrant abuses made known in the press. But it will not relinquish its control mechanisms, including control over the appointment of kolkhoz chairmen. The rubber-stamping process by which such appointments are made to look like elections is simply another version of the method applied in all voting procedures in the Soviet Union. In the last analysis, the kolkhoz General Assembly is the grass-roots cousin of the Supreme Soviet, formally the highest legislative body of the land—which not only has never rejected a government bill, but has passed them all without a single dissenting vote. True to its totalitarian nature, the Soviet state seems able to enact democratic provisions as law, but never to realize them.

Rights and Duties of the Kolkhoz Members

The duties of kolkhoz members are: (1) to work in kolkhoz production; (2) to observe socialist labor discipline and the Exemplary Statute of the kolkhoz; (3) to protect state and kolkhoz property; and (4) to carry out the decisions of the General Assembly and other organs of kolkhoz management.

The duty to work was first regulated by a decree of May 27, 1929, establishing an obligatory minimum of workdays a year on which a kolkhoz member had to work for the collective. This minimum was increased by a decree of April 15, 1942. Violations were punishable with six months of forced labor and a loss of 25 percent of income. However, by decrees of June 23, 1954, and March 6, 1956, the uniform quota was abandoned and individual kolkhozes given the right to regulate the workday requirement.

Labor discipline requires from kolkhoz members compliance with all work regulations. Good workers are rewarded with medals, orders and titles of Heroes of Socialist Labor. Deficient work is punishable by fines, or in the most serious cases, exclusion from the kolkhoz.

The legal rights of the kolkhoz member are: (1) to be assigned collective work in accordance with personal capacity and qualifications; (2) to be remunerated in money and kind in relation to the amount of labor devoted to kolkhoz production; (3) to be insured against old age, illness, or disability; (4) to earn a subsidiary in-

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come from a private "kitchen" garden; (5) to participate in the management of the kolkhoz; (6) to use kolkhoz implements and pastures; (7) to enjoy a paid annual leave, the duration of which is set by the individual kolkhoz.

The remuneration of a kolkhoz member consists of a share of the kolkhoz's income, the size of the share depending on the quantity and quality of his work. The measurement unit for both quantity and quality is the workday (*trudoden*). The value of a workday varies with the productivity and income of the individual collective. The earning of a kolkhoz member is thus unstable: it depends both on the harvest in a particular year and on the ability of the management to run the affairs of the kolkhoz. The distribution of shares in money and kind takes place at the end of each year.

In 1957 a move was initiated to replace the system of remuneration by workdays with a system of fixed wages, permitting advance payments to kolkhoz members. However, only well-to-do kolkhozes, with other sources of income in addition to crop profits, have been able to set up the transitional funds necessary to pay fixed wages to their members. Such funds require advances of cash from the State Bank, made only to the small minority of solvent kolkhozes. Thus the trend has not developed extensively.[11]

With regard to pensions and social security, until July 1964 the peasants suffered severe discrimination as compared to the rest of the working population. According to Art. 120 of the Constitution, Soviet citizens were to be provided "maintenance in old age and also in case of sickness or loss of capacity to work." But whereas these rights were guaranteed to workers and employees through a system of state social security, the collective peasant had to rely on his own kolkhoz to set up a "special fund" for pensions and compensation, as required by Art. 11 of the Statute. Many kolkhozes were simply unable to accumulate these funds. N. S. Khrushchev summed up the situation at a Congress of Agricultural Workers in 1956:

Some kolkhozniks can say: "Pensions are given to workers and employees, but not to us kolkhozniks." Comrade kolkhozniks, you are members of kolkhozes, of your cooperative economy. If you see to it that every kolkhoz works well, expands its economy, the kolkhozes will create for their aged and invalids the best conditions, a secure old age.[12]

A law of July 15, 1964 (enforced as of January 1, 1965) affords some relief for the peasants in this respect.[13] It provides pensions and allowances for kolkhozniks to be paid out of a new special fund financed in part by annual allocations from kolkhoz income and in part by the state budget. The amount of the state's contribution is not set in the law and will be established later. Besides pensions for the aged, allowances are approved for invalids, disabled dependents of deceased collective farmers, and expectant mothers. While a step in the right direction, the new law does not eliminate the long-standing discrimination against kolkhozniks as compared to workers (including sovkhoz workers). Pensions for male kolkhozniks begin at age 65, whereas workers are eligible at 60 (for females the respective ages are 60 and 55). The minimum pension awarded a kolkhoznik is 12 rubles monthly, as against 30 rubles for a worker. The kolkhoznik's pension cannot exceed 50 rubles a month, or 50 percent of his previous earnings, plus 25 percent of any amount he had earned in excess of 50 rubles a month. The rate of allowance for disabilities is also lower for kolkhozniks than for workers. Beyond the discriminatory rates themselves, the main defect of the law is its relation of allowances to the income of the kolkhoznik, which remains unstable. Certainly the law was a concession compelled by the catastrophic conditions of agriculture in 1963.[14]

The most cherished privilege of a kolkhoznik is his right to a plot of land to raise produce for subsidiary income. This right is guaranteed by the Constitution and by the Statute. According to the original terms of the Statute (Art. 2), the size of the plot was to be one-quarter to one-half hectare in general, but in some districts up to one hectare depending upon local conditions (1 ha = 2.47 acres). Farm buildings necessary for the care of livestock, etc., had to stand on the allocated plot, though not dwelling houses. In 1939 the plot was cut to three-fourths of an acre. However, by a law of May 6, 1956, kolkhozes were conceded the right to establish the plot size individually.

[11] As of July 1, 1959, only 5.6 percent of the kolkhozes had introduced fixed wages for their members.

[12] *Selskoe khoziaistvo*, July 31, 1956.

[13] *Vedomosti Verkhovnovo Soveta SSSR*, No. 29, 1964.

[14] See S. Kabysh, "The Problem of Remunerating Kolkhoz Workers," *Bulletin of the Institute for the Study of the USSR*, No. 1, January 1965, pp. 3-14.

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The kolkhoz members are entitled to sell the products of their plots on the free market. The regime has at times asserted that the individual plots will steadily decline in importance with the increase of the public economy, but it seems doubtful. Output from the plots has proved essential not only to ameliorate the peasants' lot but to furnish the food supply for the country at large. It is clear that a great number of kolkhozniks would have starved to death without this subsidiary economy, since the income from collective work is insufficient for survival at an overwhelming majority of kolkhozes. That is why the kolkhozniks persistently seek to enlarge their individual plots and to work on them as much as possible.

The duty to preserve public property has been criminally enforced by the laws of 1932, 1947 and 1961 cited above. The earlier laws were prompted by the strivings of the kolkhozniks to increase the size of their individual plots by grabbing kolkhoz land. In another decree cited earlier ("On . . . Violations of the Statute of Agricultural Cooperatives," September 19, 1946), it was stated that "the pillage of public land is being committed . . . [through] increasing the size of private plots by arbitrary occupation of public land." An investigation had disclosed 2,255,000 cases of misappropriation of collective farm land in 1947. As a result of the investigation, the kolkhozes recovered 4,700,000 hectares of land.[15]

The right of tenure on the private plots belongs not to the individual collective farmer but to his household (*dvor*). The "*dvor*" is a peculiar and complicated institution of the Soviet legal system, regulated variously by kolkhoz, land, civil and family law. The *dvor* of a peasant is defined in the RSFSR Land Code (Art. 65) as a "labor family union of persons collectively conducting a rural economy." There has never been a separate definition of a kolkhoz *dvor*, so relevant provisions of the Land Code are generally applied to the kolkhoz *dvor*, especially with regard to its family character, its joint property, the equal rights of members of the *dvor*, and the apportionment of its property.

Special provisions regulate inheritance and bequeathal rights of the kolkhoz member. His share in the property and goods assigned to a household cannot be bequeathed; it must remain in the household for the common use of all other members. However, his individual earnings as a member of the collective—that is, his share in products and in cash from the income of the kolkhoz, as well as any property acquired with these assets—are his personal property and can be passed on as an inheritance in accordance with the provisions of the Civil Code.

A final note might be added concerning the collective peasant's ability to find a job outside of the kolkhoz or to travel within the country. According to the Passport Statute, a kolkhoz member is not obliged to have passport papers while living at his collective. However, if he travels, he is required like all other Soviet citizens to be in possession of a valid passport. He

Sign at top: State Farm
Below: From Private to Public

—*From* Krokodil (Moscow), Oct. 10, 1963.

[15] *Izvestia*, March 7, 1947.

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can obtain it only with the consent of the kolkhoz management. Also, contracts for work outside the kolkhoz must be registered with the management. Thus, if the peasant leaves the kolkhoz or takes an outside job against the wishes of the management, the latter may refuse consent for delivery of a passport. Legally, it is apparently not much easier to escape the collective life than to endure it.

The kolkhoz system has proved to be a failure economically. Today the former "bread basket" of Europe is forced to buy bread in large quantities abroad.

One reason for this failure is the fact that Soviet legislation relegated the peasant to a situation worse than that of the rest of the working population. The socialist formula, "to each according to his work," is not applicable to the kolkhoznik, because his income depends not only on his labor, but on the quality of the collective's land, on variable weather conditions, and on the ability and integrity of the management of his kolkhoz. He may work as hard and as long as his neighbor in a better organized kolkhoz, and he will earn only a part of what his neighbor earns.[16] A second and related reason is the fact that the kolkhoz system has not satisfied the peasant's historical craving for "more land" as personal property; he has been as starved for land under the Soviet regime as he was in the time of the tsars. Yet his psychology has remained that of the small landowner—the "petty bourgeois," as Lenin put it. The eradication of the "kulaks" did not liquidate their instinctive proprietary attitude toward the land, which seems inherent in all peasants without regard to their material worth. The war waged by communism against the peasantry, started in 1917, is still latent beneath the surface of collectivism. The catastrophic agricultural record of recent years shows that victory is not yet on the side of the Soviet government.

[16] For instance, *Izvestia* of Feb. 9, 1964, reported that in two neighboring kolkhozes of the same size, growing the same crops, the kolkhoznik's workday was worth 3 rubles 70 kopecks at one and only 1 ruble 61 kopecks at the other. Quoted by S. Kabysh in *Analysis of Current Developments* (Munich), No. 11, 1964-65.

The Family

By Bernard Rudden

The Soviet regime has recently promised its people a new family law; and the press, both lay and legal, has carried a good deal of discussion about possible provisions. The most striking feature of this discussion is the diffidence —almost amounting to timidity—of the proposals for reform. There are failings in the existing law on whose removal all agree; but, when it comes to fundamentals, the mood is one of caution. Such hesitation contrasts with the vitality of recent debate on other issues of import. The explanation lies in certain tensions that appear to be inherent in the regime's concept of the family, and that are emerging more sharply at the present stage of Soviet social and economic development. This article will describe the official Soviet position on the

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family, with a brief account of its theoretical foundations and historical development, and will try to predict its future course.[1]

Soviet policy towards the population question has probably always been the same. Faced with the uninhabited emptiness of so much of Russia, with the lives lost in revolution, famine, and war, and with the specter of stirring masses to the East, the country's chief interest in the family has been as an instrument of population growth. Widely varying theories, however, have at times obscured this long-term aim, and the family has been subjected to different legal manipulations as the interests of ideology, productivity, or population assumed immediate importance.[2]

Early theorists of the revolution often failed in the heat of polemic, to distinguish between separate strands of policy. On the one hand, there was feminism—the policy of freeing women from religious, paternal, and political subjugation which was largely achieved by the Revolution. On the other hand, there was sexual liberalism, according to which the act of love was to be as simple (and, one feels, about as enjoyable) as drinking a glass of water. The latter concept was from the first, and is today, a battlefield.

Whatever their moral viewpoint, the contending parties have always agreed on the third, classically Marxist, premise: without economic independence every feminine advantage is a sham. The fact that women may vote, hold property, obtain a divorce, means nothing if the husband is the only wage-earner. His wife depends upon him for her bread, and therefore in any marital conflict her hands are tied; not even the prospect of alimony can erode the habit of servitude and so make her choice really free. Any power she may have is an illusion. This is obvious to the Marxist when he contemplates the West. He opens, for instance, *Vogue, Elle, Woman's Own:* the skills they teach a woman —how to catch and hold her man—are the tricks of the slave; and, worst of all, they induce her to accept and enjoy this role as if there were no other. Indeed, to abuse Tacitus, modern capitalism has merely enabled the captives to captivate the captors.

Things, presumably, are different in the USSR. The Constitution provides (Article 122) that women are accorded, equally with men, the right to work. Some 48 percent of the total labor force is female;[3] and 70 percent of the children under 16 have mothers who work.[4] There—according to the Marxist—is the first stage of the wife's financial independence.

It is clearly recognized, of course, that a condition of effective economic equality is the state provision of institutions for the care of children, and these have always been featured in Soviet plans. Yet by 1960, there were only enough nurseries, boarding-schools, and similar institutions to accommodate 10 percent of the children under 16.[5] The scarcity of such facilities makes selective admission necessary, as is well illustrated in a letter published in *Izvestia* last December. The writer explained that he and his wife were at work all day, and were unhappy about leaving their year-old daughter with neighbors. They applied to the local nursery, which had vacancies:

There, the request was considered and refused. The reasons?—You'll never guess . . . they established that . . . my wife and I live together amicably. I don't drink spirits, or beat my wife. I was never taken to the police station. I don't play the hooligan on the streets, or insult the neighbors. . . . They took this decision: since the spouses are morally stable, and normal conditions for rearing children have been created in the family, we refuse to accept their daughter.[6]

Another factor affecting women's economic independence is the problem of housework. Though large numbers of women go out to jobs, the housework remains to be done—Soviet sources reckon on nine hours of it a day for a family of three to four.[7] Who is to do it? In many cases, the grandmother; but, if she has several offspring, some will have to go without her help. The husband? Apparently not. Recent Soviet studies of leisure pursuits demonstrate that the overwhelming bulk of domestic tasks falls on the wife; and, as the working day shortens, the time she devotes to housework increases. Any improvement of this situation

[1] The writer would like to express gratitude for the stimulating comments offered by Professor S. Szirmai of Leiden University. This article concerns only the RSFSR; the other republics, especially in Muslim areas, have their own problems.

[2] There is extremely useful documentation and discussion in R. A. Schlesinger, *The Family in the USSR*, London, Routledge & Kegan Paul, Ltd., 1949.

[3] *SSSR v tsifrakh v 1963 godu* (The USSR in figures, 1963), Moscow, "Statistika" Publishing House, 1964, p. 148.

[4] M. Yanowitch, "Soviet patterns of Time Use and Concepts of Leisure," *Soviet Studies* (Oxford), Vol. XV, No. 1, 1963, p. 27 (Soviet source cited).

[5] V. Kostakov and P. Litviakov, "Ispolzovanie trudovykh resursov v perspektive" (The use of labor resources in perspective), *Planovoe khoziaistvo* (Moscow), No. 3, 1962, p. 22; also see Yanowitch, *op. cit.*

[6] *Izvestia*, Dec. 20, 1964.

[7] See the Soviet source referred to in note 5.

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would seem to depend on the provision of better shopping, washing, and cleaning facilities. There is certainly no intensive drive to get the husband to the kitchen sink.

While such problems remain to be solved satisfactorily, the attention paid to them illustrates the Marxist emphasis on the economic facts of family life. The provisions of Soviet law on the family should therefore be considered against the background described above.

Marriage and Divorce

The makers of the Revolution considered that their first task in relation to the family was to break the power of church and husband. Civil marriage was substituted for religious, and divorce was permitted by mutual consent declared at the Registry Office, or upon the application of one spouse to the court.[8] The wife was not bound to live with her husband, nor to take his name, and there was complete separation of property. The first two rules still apply. Birth alone was declared the basis of family ties, and all legal discrimination against illegitimate children was abolished.

The legal separation of goods proved so unfair to the housebound mother that, in the 1926 Family Code, it was replaced by community of matrimonial property.[9] Also, each spouse was made liable for maintenance if the other was in need and unable to earn—a variation on the theme, he (or she) who does not work shall not eat. However, the obligation ended a year after dissolution of the marriage. The position as to property and maintenance remains the same today.

The most striking innovation of the 1926 legislation was the great relaxation of the requirements for marriage. Registration was made optional, henceforth to be considered merely evidence—desirable, but not exclusive—of the marital relationship. Precisely the same matrimonial rights and obligations flowed from a union which was not registered but evidenced by "the fact of cohabitation, combined with a common household . . . manifestation of marital relations before third parties . . ." and the like.[10] At the same time, divorce was removed entirely from the courts and could be obtained by one party at the Registry Office, which sent the other a postcard notifying him or her of the end of the marriage.

The results of these latter changes were unhappy. Marriage was compared to taking a tram—if you found you had boarded the wrong one, you simply got off. The rate of divorce and juvenile delinquency rose rapidly. "The family has gone with the wind," wrote one author. "They fall apart at the first sign of bad weather." [11]

The 1930's saw some moves towards the legal encouragement of steadfast and responsible relations. In 1935, parents who failed to supervise children were made liable to be fined for their disorderly conduct, or sued for their torts.[12] In the latter case they were (and still are) solely liable till the child reached fourteen, and thereafter jointly with him. In 1936, divorce was made more expensive and both parties had to report to the Registry Office.[13] *De facto* marriage continued until the conditions of the war brought forth some drastic amendments.

The main measures of reform were embodied in a Decree of July 8, 1944, which (together with the 1926 Code as amended) remains the basis of the present marriage law of the USSR.[14] Its chief aims were to encourage the birth of children and to foster stable marriages without at the same time introducing discrimination against the unwed mother and her children. So it provided that only registered marriage would produce the rights and obligations of husband and wife—rights, that is, to maintenance if in need, community of property, inclusion in a state tenancy, and inheritance. At the same time, the procedure for dissolution of marriage was altered; the Registry Office was no longer to be the impartial recorder of the wishes of the parties. Divorce now entails, firstly, an application to the People's Court and payment of a fee of 10 rubles. Notice of pro-

[8] *Sobranie uzakonenii . . . RSFSR* (hereafter *SU RSFSR*) 1917-18, No. 10, Art. 152; No. 11, Art. 160; No. 76-77, Art. 818. Also G. M. Sverdlov, *Sovetskoe semeinoe pravo* (Soviet Family Law) Moscow, Gosiurizdat, 1958, pp. 62-70.

[9] Code of laws on marriage, the family, and guardianship, *SU RSFSR* 1926, No. 82, Art. 612. Where provisions still in force are discussed, reference is to the official text of the Code including amendments enacted up to Feb. 1, 1961.

[10] Art. 11.

[11] Demian Bednyi, *Vserez i—ne neldolgo* (Seriously—but brief), quoted by G. M. Sverdlov, *Prava grazhdan v seme* (Citizens' Family Rights), USSR Academy of Sciences, Moscow, 1963, p. 101.

[12] *Sobranie Zakonov . . . USSR* (hereafter *SZ USSR*) 1935, No. 30, Art. 252; *SU RSFSR* 1936, No. 1, Art. 1.

[13] *SZ USSR* 1936, No. 34, Art. 309.

[14] *Vedomosti Verkhovnovo Soveta USSR* 1944, No. 37. With its later amendments, it is printed with the official text of the code.

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ceedings is next advertised in the press—which may take some months. The court then hears the parties and witnesses. At this stage it must do what it can to reconcile the couple, and only if this fails will the case go to a higher court. If the latter grants a decree, a fee (from 50 to 200 rubles) may be exacted, usually from the "guilty" party, and must be paid before the divorce can be registered. The court's judgment also settles questions of custody, alimony, maintenance, and property. In passing, it may be noted that the dissolution of marriage is no ground for one party's eviction from the other's state apartment, so that in many cases divorced couples may still have to live together.[15]

Soviet laws have never laid down a list of grounds for divorce. This was unnecessary when the will of the parties was the deciding factor. Since 1944, according to the intent (but not the text) of the Decree, mutual consent and, *a fortiori*, the wishes of one spouse, are not sufficient grounds. The higher tribunal, as well as the people's court, is supposed to strengthen the family. To cite some specific cases, decrees have been refused where the allegation was that the wife did not know how to cook or do the washing; where marital lapses have been condoned; and where the petitioner sought divorce on the basis of his own adultery and rejected the forgiveness of his wife. On the other hand, infertility has been widely accepted as a reason for ending marriage.[16]

There has been some recent Soviet comment to the effect that in practice mutual consent is sufficient to obtain a divorce and indeed, that anyone determined enough can ultimately succeed. This assertion seems supported by the fact that over 97 percent of all divorce petitions heard in the RSFSR are eventually granted.[17] (The divorce rate is said to be about one in ten marriages.[18]) The procedure is nonetheless slow and cumbersome. The reconciliation stage has been described as "impracticable, a formality, and utterly superfluous."[19] Furthermore, the appropriate higher court may be at some distance from the matrimonial home, so many cases are heard in the absence of witnesses, or even of the parties. Finally, there is no efficient machinery for collecting fees, which are supposed to be paid when the divorce is registered. To illustrate: "In 1947 a 20-year old man, C. married M. who was 48. In 1953, on his petition, the . . . court dissolved the marriage, exonerated him from paying a fee, and ordered the recovery of 500 [old] rubles from the defendant. Since M. did not want to marry anyone else, to this day she has not paid the fee. . . ."[20]

Parents and Children

The woman herself must observe all the requirements of hygiene during the period of pregnancy, remembering that during those months she does not belong to herself, that she is working for the collective, that from her own flesh and blood she is producing a new unit of labor . . .[21]

Alexandra Kollontai's words may seem bleak beside the cozy glow that surrounds the Western mother, but the attitude they express is vital

[15] B. Rudden, "Soviet Housing Law," *International and Comparative Law Quarterly* (London), Vol. 12, 1963, Part 2, pp. 601-02.

Sign on wall: Chairman of Village Soviet
Below: With us it's not like in a church, but one-two-three and it's done!

—From Krokodil (Moscow), Nov. 10, 1963.

[16] L. Kazanak, "Dela o rastorzhenii braka" (Cases on dissolution of marriage) *Sotsialisticheskaia zakonnost* (Moscow), No. 7, 1958, p. 36 ff.; M. T. Oridoroga, *Rastorzhenie braka* (Dissolution of Marriage), Moscow, Gosiurizdat, 1958; same author, "Osnovaniia rastorzheniia braka" (Grounds for dissolution of marriage), *Sovetskoe gosudarstvo i pravo* (Moscow) No. 1, 1957, p. 111 ff.

[17] E. Smolentsev, "Podsudnost del o rastorzhenii braka" (Jurisdiction in cases on dissolution of marriage), *Sotsialisticheskaia zakonnost* No. 3, 1957, p. 61.

[18] G. M. Sverdlov, "Zakon o razvode i statistika" (The divorce law and statistics), *Sovetskoe gosudarstvo i pravo*, No. 10, 1964, p. 35.

[19] Smolentsev, *op. cit.*

[20] L. Kazanak, *op. cit.*, p. 38.

[21] A. Kollantai, *Women's Labor in Economic Development*, 1923; translated extract from Schlesinger, *op. cit.*, p. 54.

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to Soviet Russia's future. The state has an interest in every child. It is possible, however, that an individual woman, faced with the demands of a "society which is building communism," might prefer to limit her achievement in the field of motherhood. In the Marx-versus-Malthus conflict, several weapons are employed. Contraceptives are not readily available, nor even information on contraceptive measures. (Interestingly, *Izvestia* recently translated three stories from the Chinese press on the lines of "How I had my seminal canals cut and tied," by Chen Yao-Min; there was almost no editorial comment, but the apparent expectation was that readers would be revolted by this very crude Chinese propaganda.[22])

Abortion was first permitted in 1920 but, because of its popularity, was totally banned in 1936. Almost 20 years later it was legalized if performed in hospitals, but otherwise it remains a crime.[23] In contrast to the wide discussions of the 1930's, its reintroduction was effected in silence.

The fact that motherhood was considered an essential productive activity in the Soviet Union implicitly raised the question why it should be limited to married women, especially in view of the numerical imbalance in the sexes caused by the war. The 1944 Decree, therefore, tried to achieve two almost incompatible aims: (a) to strengthen registered family life; and (b) to encourage the career-mother, whether she was a wife or not. The first aim was to be attained by the advantages of registration and difficulty of divorce outlined above. The second was to be fostered by the payment of state aid: to the married woman from the third child onwards; to the single girl from the birth of the first. Both, if they have sufficient children, can qualify for distinction in the way of medals and titles—10 will make one a Mother-Heroine.

It is repeated endlessly in Soviet literature that the extra-marital child is in no worse position than that born in wedlock. In economic terms this is not true. The single mother gets state payments of 5 rubles a month for her first child, 7.5 rubles for two, and 10 for three; thereafter she has birth grants and smaller monthly payments. But if the children have a registered father, the court can order him to pay one-fourth of his income for the maintenance of one child, one-third for two, and one-half for three or more children. Even assuming an average monthly wage of only 50 rubles, the difference in payments is considerable, an inequity not offset by the punctuality of state payments.

The burning problem of Soviet family law, and the heart of the conflict between the law's two aims, is the unmarried father. In the early days, when paternity, not wedlock, was the vital issue, his name appeared on the birth certificate and he was bound to support his children. If there was some doubt as to the father, affiliation orders could be made against several men; but this encouraged the girl who found herself pregnant to go collecting candidates for paternity, and was stopped in 1926. Still, the general rule of liability of the father remained in force until 1944.

Since the Decree of that year neither the single mother nor her children have any claim whatever on the money or name of the father. This enormous innovation was supposed to make motherhood available to the spinster on the same terms as any other job. Its most important object was, of course, to promote registration and to curb the easy girl. In fact, it has had two quite different results. It stimulates the casually promiscuous male, by relieving him of any risk; and it encourages the prudence of the long-term lover, who settles down with a woman and raises a family—but avoids registering the union, just in case. The papers frequently feature affecting scenes such as this one between Nikolai and Rita. "It was like a blow from round a corner, unexpected, knocking her off her feet. . . . I don't want to live with you any longer, I'll give no money for the child. And just try to prove he's mine. We're not registered. . . ." [24]

The delay and expense of divorce interacts with this situation to produce many cases where a registered marriage has broken up, without divorce, and one or both of the spouses have formed an apparently stable, but unregistered, union. The woman and children of the new family live always in uncertainty. The courts have responded to this problem by extending the application of Article 42 (3) of the Family Code, which imposes the duty of maintenance on persons who have taken in children with the intention of bringing them up. This practice has received the blessing of the highest court, but of course it catches only the conscientious father, while the casual progenitor goes scot-free.[25] Undoubtedly, the new law will deal with this.

[22] *Izvestia*, Sept. 14, 1963.
[23] *SU RSFSR* 1920, No. 90, Art. 471; *SZ USSR* 1936, No. 34, Art. 309; *Vedomosti* . . . 1955, No. 22, Art. 425; *Criminal Code RSFSR*, Art. 116.
[24] *Pravda*, Aug. 19, 1963.
[25] See case of Antipina, *Biulleten Verkhovnovo Suda SSSR*, No. 1, 1961, pp. 7-9.

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The birth certificate is also ripe for amendment. As the Head of the Secretariat of the USSR Supreme Court's Permanent Commission wrote in April, 1963: "Many mothers and fathers write to us about the extremely unpleasant position which arises when, in the child's birth certificate, instead of particulars about the father, there is a dash.[26] Probably the new law will introduce a short form, giving no parental details, for all births. Such a certificate has been used in England for some years.

The Future

Apart from the probable amendments mentioned in the last two paragraphs, Soviet jurists do not offer much enlightment on the specific reforms that might be expected in the new law,[27] so one must conjecture in general terms. Let it be assumed that, in the near future, the party program is fulfilled. Women will be in complete economic equality with men, and a network of state child-care institutions will ensure that their independence is real. It seems that the official policy will be to destroy the family as a unit of consumption and education, but to foster it as a sexual union. The leading Soviet jurist in this field, in a book published in 1963, pours scorn on the family as "its own sort of fortress, fenced off from society." He envisages the widespread use of communal eating arrangements, with the children being fed at school, and states: "With the further progress forward on the path of Communist construction, the family will more and more lose its significance as a cell of upbringing separated from society." [28]

If this occurs, the following questions will have to be answered:

(1) If there is complete economic equality, will sex and companionship be enough to keep a marriage steady? On the financial side, does the wife's dependence play any part in helping couples to overcome marital difficulties? And, on the psychological level, will men and women be happy to discard their roles of protector and protected?

(2) Will women be emotionally content with earning a wage and bearing children, without having a hand in their rearing? Does the latter not fulfill maternal needs in addition to the purely physiological satisfaction of producing offspring?

(3) Will it be possible to maintain state support and protection of the single mother and child without thereby weakening the registered marriage?

(4) How will children be affected by communal upbringing?

It is perfectly possible that reasonable answers will be offered to these questions. The important point, however, is that the problems *cannot be studied objectively.* To do so it would be necessary to investigate, administer tests, keep case-histories, probe motives that may lie below the level of reason, in short to carry out a scheme of sociological and psychoanalytical research uninhibited by ideological precepts. But Soviet man is held to be responsible, rational, and perfectible.[29] How many times have Soviet writers blamed juvenile crime on indulgent parents without realizing, apparently, that they are simply pushing the problem one stage back? A recent work entitled *Marxism-Leninism on Marriage and the Family* described the report by Dr. Alfred Kinsey ("that zealous apologist of imperialism") on the sexual behavior of women as *skandalnaia.*[30] It should be possible for a Soviet scientist to prove, instead of merely assuming, that human behavior is not to some degree determined by unconscious forces. But any such study in Russia would look like the thin end of the Trojan horse.

This leads to a more general observation about the regime's attitude toward the family. It is the writer's impression (based on the scantiest of evidence) that sexual life in Russia is less complex, more secure, even more wholesome than that found in several capitalist countries.[31] Certainly, homosexuality seems no great problem, and there is nothing of *Playboy's* prurience. Two factors, however, may indicate the

[26] I. Babukhin and Yu. Korolev, "Predlozheniia trudiashchikhsia k zakonu o brake i seme" (Workers' proposals on the law of marriage and the family), *Sovetskaia yustitsiia* (Moscow), No. 7, 1963, p. 4.

[27] See, *e.g.*, S. Kurylev, "V interesakh semi" (In the interests of the family), *Izvestia,* May 22, 1958; A. M. Riadov, *Lichnye i imushchestvennye otnosheniia mezhdu roditeliami i detmi* (Personal and property relations between parents and children), Voronezh University Press, 1961; O. P. Kolchinaia, "Birth of a New Law," *Trud* (Moscow), Feb. 16, 1964, translated in *Current Digest of the Soviet Press,* Vol. XVI, No. 11, p. 10.

[28] G. M. Sverdlov, *op. cit.*, pp. 12, 15. In an earlier work, he stood up for "strengthening the family": see *Sovetskoe zakonodatelstvo o brake i seme* (Soviet Legislation on marriage and the family), Gosiurizdat, Moscow, 1961.

[29] See R. A. Bauer, *The New Man in Soviet Psychology,* Cambridge, Mass., Harvard University Press, 1952, *passim.*

[30] A. G. Kharchev, *Marksism-Leninism o brake i seme,* Moscow, Soviet Science Publishing House, 1959, p. 4.

[31] Some confirmation is provided by R. A. Bauer, Alex Inkeles, and Clyde Kluckhohn, *How the Soviet System Works,* Cambridge, Mass., Harvard University Press, 1956, p. 136.

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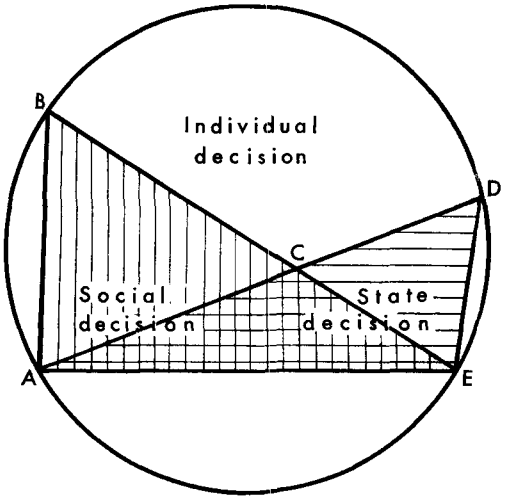
contrary. One is rape. This has recently been made punishable by death if committed in a group, or on a minor, or with injuries, or by a dangerous recidivist.[32] At the same time, the courts are broadening the definition to include other sexual violations, to remove the consent of the minor as a defense, and to make group rape cover cases where one man has accomplices who do not perform the act.[33] Furthermore, the reports of trials in the Soviet press are depicted in colors so vivid that one has the impression that the reader is being invited to *enjoy his indignation;* to join, in David Riesman's phrase, those moral sadists whose own impulses are their first victims.[34]

The other factor is the official advice offered on sexual matters—advice so superficial as to be quite inept. Typically, the theoreticians use the word *amoral* (*amoralnyi*) to describe conduct which they clearly regard as *immoral.* An *Izvestia* article, for instance, recounts some cases of adolescent licentiousness. The youngsters defend their behavior by quoting the early feminists and say, "The concept of the family is reactionary . . . the old church morality has collapsed and nothing has risen in its place." To this dilemma all *Izvestia's* writer has to offer is (a) a quotation from Marx ("I am in love from head to foot"); (b) a comparison between Fellini's *La Dolce Vita* and the Russian film, *Ballad of a Soldier;* and (c) the remarks, "Yes, the church doesn't damn you, and the laws don't punish you; but why, after the 'happy moments' does man almost always feel something like a melancholy hangover? Why does an 'after-taste' still remain in his soul?" [35]

It is not surprising, then, that the proposals for the new law should confine themselves to obvious abuses—the bachelor father, the telltale certificate, and the slow divorce. The other factors presented here—economic inequality of the sexes, the psychological problems which may remain after equality has been achieved, and the ineptitude of sexual instruction—all combine to produce grave problems. The following prediction is offered as to the solution which will be adopted to cope with these problems.

Individual, State and Community

Leaving aside purely determinist views of human nature—as, in practice, any state must—it can be seen that in all societies there are three areas of decision. In the last analysis, all choices are personal; but, within that field a great number will be affected by community pressures, by a desire not to attract the adverse attention of the group. A smaller number will be controlled by legal rules, backed up by some external sanction (such as a fine or imprisonment) which may co-exist with, but is logically distinct from, social disapproval. A diagram may make the point clearer.



The area of decision governed by social consideration (the triangle ABE) may be small or large in relation to any given circle of decisions. The proportions will depend on the age of the society, its history, traditions, caste-structure, and so on. By contrast, in the interests of efficiency, the area of decision governed by state regulation (the triangle CDE) should be as small as possible. Many state rules will support, and be reinforced by, social attitudes; triangle ACE should, therefore, represent the area of greatest conformity to a given pattern of behavior. However, it is not necessarily in the best interests of the state to include therein all desirable actions. Some are better left in triangle ABC, since social responses are prompt, spontaneous, inarticulate, but effective.

To illustrate with a Soviet example, in 1959 one Sergeiev proposed to a girl. She accepted, and they went to the Registry Office to give notice of the wedding. Impressed by this, the girl

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[32] *Biulleten Verkhovnovo Suda SSSR* No. 3, 1962, p. 15; No. 3, 1964, p. 18.

[33] See case of Malyi, *ibid.*, No. 3, 1964, p. 32 (sodomy on a three-year-old girl); case of Sidorenko, *Biulleten Verkhovnovo Suda RSFSR*, No. 3, 1962, p. 16 (consent of nine-year-old); case of Shishkin and Ivanov, *ibid.*, No. 10, 1962, p. 13 ("group" rape).

[34] *Literaturnaia gazeta*, Aug. 17, 1963; *Komsomolskaia pravda*, April 17, 1963.

[35] *Izvestia*, Jan. 28, 1962.

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yielded to ardor, a child was conceived, and her lover then refused to go through with the ceremony. He was convicted of rape by deceit, but the RSFSR Supreme Court College for Criminal Cases set the verdict aside, saying, "Sergeiev's act, as contrary to morals, may be judged by the community and the appropriate measure of influence applied." [36]

In all modern societies lines AB-BE are subject to endless change, as the mood of a community alters; one has only to think of the decrees of fashion to see an everyday example. But usually, the perimeter of state-controlled decision is clearly marked; laws are public and precise. Russia has long been a country whose rulers use the law to make men "good." It seems, however, that the latest approach to the family will be based on a new method. The line AC will be *deliberately blurred.* Thus large areas of personal decision, especially on moral matters, will be regulated by *quasi*-legal means. Judges are already directed to report instances of parental neglect to the couples' workmates and neighbors. Comrades' Courts have been trying divorce and custody cases—without jurisdiction at the moment, but what a perfect setting they would provide for the reconciliation scene. In state apartment blocks the house committee, and in private residental areas the street committee, are designed to focus public attention on personal affairs. The volunteer militia keeps a check on rowdy children, while house-and-family detachments call at people's homes to see if they are observing the socialist way of life. Some sort of "Marriage and Motherhood Council" seems just around the corner.

The process of fostering the family spirit will thus be two-fold. On the one hand, near-legal forms and institutions will be employed to impose standards—say of dress, diet, or belief—that are usually not the law's business. On the other, public opinion wil be focussed on the infringement of legal rules until (transmuting, as the Marxists have it, quantity into quality) such opinion itself becomes a state sanction. To cite an example, there is a criminal penalty for malicious failure to pay maintenance. But instead of prosecuting a recent offender,

. . . the procurator of Vygonichskii raion *of Brianski* oblast *put the question of Cherkasov's behavior up for discussion at a meeting of the inhabitants of the village of Uta. More than 200 came . . . those present requested Cherkasov to find himself a job at once and pay the maintenance regularly.*[37]

A final quotation from the Soviet press epitomizes the trend that has been in evidence. Emphasis has been added to call attention to the deliberate, and revealing, confusion of terms used. The subject of discussion is a certain Ozhederov who had ill-treated relatives, despite a judgment in their favor:

He is not afraid of the court, *but he fears the eyes of his neighbors, he fears people who have a* right *to the strictest measures of* punishment, *such as are found in no article of a* code—*the right to surround a man with public contempt. What the* code *calls a* civil case—*these people call a* crime *against our Soviet* morals.[38]

Love Me, Love My Neighbors

Marriages often disintegrate because of family arguments and conflicts with no valid basis. Statistics show that in a large proportion of unsuccessful marriages it is the husband who is at fault (in almost half the cases, because of drunkenness). What is needed here is the intervention of people who are well acquainted with the quarreling parties and who wish to preserve the family concerned, prevent its disintegration—in some cases, even the intervention of comrades' courts. . . .

Marriage and the family, because of their social content, cannot be the personal, private affair of the married couple. Under the protection of the state and society, these institutions themselves play a vital part in the development of society, and they must conform to public morality and the state legal order. . . .

—*From "The Integration of Morality and Law in Marital and Family Relations," by Yu. A. Korolev, Voprosy filosofii (Moscow), No. 11, 1963.*

[36] *Sovetskaia yustitsiia,* No. 8, 1959, pp. 93-4.

[37] S. Nikiforov and A. Merkulova, "Okhrana prav zhenshchin i detei," *Sotsialisticheskaia zakonnost,* No. 12, 1960, p. 36.

[38] *Literaturnaia gazeta,* April 12, 1956, quoted in Kharchev, *op. cit.,* p. 36.

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COMMUNIST CHINA:

Legal Institutions

By Gene T. Hsiao

Justice is an essential element of law, but law is not the equivalent of justice. They are interrelated but by no means identical. Within the framework of Chinese Communist legality, justice is mostly administered without formal court trials, and the role of the judiciary proper is secondary to that of administrative authorities. Underlying this phenomenon is the Marxist idea that judicial functions must be gradually transferred to social organizations so that society can run itself in the future without the need for a state. Thus, a dual scheme has been established whereby administrative sanctions are applied to ordinary offenses and legal penalties are reserved for crimes considered highly dangerous to the state.

In consequence, the state's legal system operates through two parallel channels. First, there is the constitutional judicial hierarchy consisting of the Supreme People's Court in Peking, high courts in provinces, intermediate courts in special districts, and primary courts in counties (*hsien*). Political control over this court system is assured by three devices: party organizations function in the courts at all levels and manipulate judicial decisions through their members; court presidents at each level are elected by and responsible to the people's congress at the same level; and finally, the Procurator-General, who is an appointee of the National People's Congress, and the local procurators appointed by him have considerable power over judicial decisions by virtue of their right to protest objectionable judgments. Thus, no institutional foundation exists for an independent judiciary.[1]

Secondly, paralleling the courts, there is a host of institutions exercising quasi-judicial and disciplinary powers, such as comrade trial

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[1] See Organic Laws of the People's Courts and the People's Procuracy of the People's Republic of China, September 28, 1954.

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committees, people's mediation committees, and party-organized mass meetings. The main functions of these bodies are to settle civil disputes among individuals and to punish those who commit minor offenses or violate socialist discipline. In his 1957 "rectification movement report," Party Secretary Teng Hsiao-p'ing made it clear that political opponents and felons are subject to criminal punishment, while those who "never commit major crimes but often commit petty offenses" are to be handled by social organizations in order to reduce the burden of the courts and assure "the order of production and society." In other words, law in Communist China is to be applied primarily for two purposes: to punish the enemies of the state and to secure stability for the development of the national economy.

The present article deals with three representative areas of the Chinese Communist legal system. The first is the system of ownership, which is built upon a trichotomous foundation with collective ownership serving as an intermediate between state and individual ownership. Because of the ambiguous legal status of collective ownership and its highly flexible role, plots retained by peasants were still made objects of private transaction as late as 1963. And because of the existence of capitalist ownership as a special form of individual ownership, "underground factories" remained in operation in 1964. Both these peculiarities are indicative of the difference that exists between Communist China and the Soviet Union in the area of property law and the crimes resulting therefrom.

Next, the institution of economic contracts operates through a two-way process to build and execute the state economic plan. In accordance with the system of ownership, commodities are divided into three categories, with the result that contracts of supply and purchase are also made in three different forms. Collective organizations are used as an intermediate force to minimize conflicts between the state and the individual.

Thirdly, the basic means of social control under the Peking regime is not law, but the police or the public security force. Police control applies to the population in general, and violations are subject to two basic types of punishment: one administratively imposed, mainly in the form of corrective labor, the other legal, *i.e.*, decided by the courts. Since the regime rejects most traditional legal doctrines such as "the presumption of innocence," court trials are largely a matter of formality. Official statistics show that up to 1956 there were only about 2100 practicing lawyers (paid by the state) for a population of 600 millions, with 670 legal counselling offices to serve a country of 1972 counties and 171 cities.[2] Besides, no concrete codes of trial procedure have been enacted by the regime. Hence, it is safe to say that Communist China's counterrevolutionary law is merely an extension of police control directed principally against the state's enemies. With all its ambiguity and vagueness, this law possesses the character of a universal penal code and affords the state maximum flexibility for the purpose of eliminating its political opponents and thus furthering party policies. Corrective labor is an intermediate penalty applied to those who breach social order but not seriously enough to incur criminal liability—such as vagrants, parasites, hooligans, minor counterrevolutionaries, and "anti-socialist reactionaries."

The System of Ownership

Marxist philosophy regards private property as the prime source of all social evils and demands its total abolition as the first and foremost task of the Communist revolution. In China this was achieved through a complex process, and a new system was established to replace the old. Since this system is at the foundation of the regime's legal and economic order, an analysis of its content is in the interest of understanding other Chinese Communist legal institutions.

General Concept.—Both Soviet and Chinese lawyers have viewed ownership as a permanent institution of human society. The basis of this attitude is Marx's statement in his introduction to the *Critique of Political Economy:* "There can be no such a thing as production, nor, consequently, society, where property does not exist in any form."

The 1954 Constitution of the Chinese People's Republic (Art. 5) prescribes four forms of ownership: state (all the people), collective (cooperative), individual, and capitalist. The first two forms have their counterparts in Soviet legislation. The third form, "ownership by individual toilers," is different from the private ownership prescribed in the 1922 Civil Code of the RSFSR (Sec. 52), but resembles the personal ownership referred to in the Stalin Constitution (Art. 10) and subsequent Soviet civil

[2] *Fukien Jih-pao*, January 15, 1957, p. 4. Figures cited for population and administrative subdivisions are based on Chinese official statistics for 1957.

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legislation. Presumably the Chinese used the word "individual" to contrast with capitalist ownership, and the Soviets adopted the term "personal" to distinguish between private ownership of the means of production (as in the 1922 Civil Code) and personal ownership of the means of subsistence.[3] The distinction between these two categories of property has been offered by Soviet jurists as a permanent guiding principle of their property law, and the Chinese have basically followed this principle. However, in doing so, Chinese legal theorists have introduced the qualification that in defining a specific thing as a means either of subsistence or of production, one must not rely on abstract concept, but instead should concretely analyze the purpose of the owner and the manner in which the thing is used. As a Chinese Communist writer pointed out, charcoal for example is a means of subsistence when used in a family for cooking, but becomes a means of production when used in a power station to generate electricity.[4] In essence, this classification of property is a matter of economic policy, rather than of operative legal principle.

State vs Capitalist Ownership.—Taking possession of the means of production in the name of society was declared by Engels to be the last independent act of the state. Thus, following the 1917 Revolution, the Bolsheviks imposed wholesale confiscation on capitalist industry and commerce in anticipation of the withering away of the state. The Chinese Communists, on the other hand, were mindful of the Soviet experience during the ensuing periods of War Communism and the New Economic Policy, and—accepting Lenin's warning that communism could not be built by "the hands of pure Communists without the assistance of bourgeois experts" [5]—they adopted a relatively mild course of action towards the capitalist sector. The Common Program of 1949 gave the state sector the leading position in the national economy (Art. 26) but at the same time granted state protection to the economic interests and private property of the national bourgeoisie (Art. 3). Similarly, the 1954 Constitution reaffirmed priority for the development of the state sector (Art. 6) while extending protection to the capitalist sector according to law (Art. 10). Politically, these concessions to the national bourgeoisie suited the purposes of the regime's "united front" policy, and economically they furthered the development of state capitalism.

But, within the Leninist scheme, law is politics. So, while the Common Program mentioned nothing concrete about the scope of state ownership, and while the constitutional provisions of 1954 limited state property to "mineral resources, water, as well as forests, undeveloped land, and other resources which the state owns by law" (Art. 6), a threefold policy of "utilization, restriction, and transformation" was carried out to socialize capitalist property. Through the enforcement of price regulation and labor law, control of bank credits, and a sequence of mass campaigns in which taxes were collected from private business owners on a retroactive basis, the regime succeeded in socializing capitalist industry and commerce by early 1956. A State Council regulation of February 8 of that year granted expropriated capitalists the right to receive "fixed dividends" at an annual rate of one to six percent (later changed to one to five percent by a State Council decree of July 28, 1956) on the basis of their original capital investment for a period of seven years (1956-1962). Largely for political reasons, this period was extended to 1965 by the Second National People's Congress in 1962.

With the elimination of capitalist industry and commerce, the state now owns all major means of production with the exception of peasants' land, which, in contrast to the Soviet Union, was first owned by individual peasants and now by the collective.

Imitating a provision in the Soviet law of August 7, 1932, the Chinese fundamental law of 1954 made *public property* "sacred and inviolable" (Art. 101). The same Soviet law laid down the death penalty for the rather broad and indefinite crime of "pillage" of socialist public property. Although this harsh provision subsequently underwent modifications, an all-union statute of May 1961 reimposed capital punishment for theft of public property in "especially large amounts." On the Chinese side, penalties for theft of state property have been prescribed in a number of separate laws. The Statute on the Punishment of Counterrevolutionaries (February 21, 1951) imposed the death penalty for robbery and destruction of important properties, both public and private (Art. 9). (The inclusion of private property was, of course due to the continued existence of capitalist ownership at that time.) A gov-

[3] For an evaluation of the Soviet doctrine of personal ownership, see Vladimir Gsovski, *Soviet Civil Law*, Ann Arbor, University of Michigan Law School, 1948, Vol. I, pp. 565-69.

[4] See Ch'en Hsiao's article in *Kung-jen Jih-pao* (Peking), August 9, 1961, p. 3.

[5] V. I. Lenin, *The Period of War Communism*, New York, International Publishers, no date, p. 36.

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ernment decree of March 11, 1952, issued in connection with the "five-anti" movement,[6] also imposed the dealth penalty for "grand theft" of state property and state economic information. The subsequent Statute on the Punishment of Corruption (April 21, 1952) was somewhat broader in application, prescribing the death penalty for aggravated cases of theft of state property by government, state enterprise, and school employees through embezzlement, stealing, fraud, misappropriation, or other mean (Arts. 2, 3). The same statute is also applicable to "workers of social groups" and "non-state employees" (Arts. 8, 15). Thus it has virtually the same characteristics as the corresponding Soviet legislation, except that it does not expressly extend protection to collective property. Technically, however, this is a very significant difference and therefore entails further discussion.

Collective vs. Individual Ownership.—The Soviet statute of 1932 created an important concept of ownership by including both state and collective property in the single category of socialist public property (see preamble and Art. 2), thus placing collective ownership on an equal footing with state ownership. This concept, which had not appeared in the 1922 Civil Code, was further developed in the Stalin Constitution and reaffirmed in the 1961 Fundamental Principles of Civil Legislation of the USSR. As indicated above, the Chinese Constitution of 1954 also used the term "public property," but nowhere has Chinese legislation defined what this property consists of. The two basic statutes (March 17 and June 30, 1956) establishing the agricultural producers' cooperatives called for "due sanctions" and compensation in ordinary cases of theft or destruction of cooperative property, with judicial action to be taken only in aggravated cases; however, there is no statute specifying the penalties to be imposed for such acts in judicial proceedings.

In practice, severe penalties, including the death sentence,[7] were inflicted upon major violators of cooperative property during the agricultural collectivization drive, but such punishment was imposed on the ground of counterrevolutionary crimes rather than of property offenses. A joint decree of the Supreme People's Court and the Ministry of Justice (October 15, 1955) urged law enforcement agencies to "deal blows to counterrevolutionaries" in order to safeguard the collectivization movement. However, the decree did not raise collective property to the level of state ownership.

The inauguration of the people's communes in 1958 raised the question of whether or not commune ownership was a form of state ownership. A party resolution of December 10, 1958, declared that commune ownership, although having elements of state ownership, would remain a form of collective ownership pending transition to state ownership. Then, on February 16, 1959, the party gave the communes an ownership system based on the three-level communal structure—*i.e.*, the commune, the production brigade, and the production team. This is known as "three-level ownership" with each level possessing a given amount of collective property. Land was first owned by the production brigade, and later by the production team.[8] Finally, an authoritative pronouncement published in October 1961 declared collective ownership to be a form of "ownership by all the people," *i.e.*, of state ownership or socialist public ownership.[9]

By implication, this invests collective ownership with the same protection given to state ownership in the area of criminal law. In civil law relations, on the other hand, differences remain. Like state ownership, collective ownership is based on socialization of the means of production and their operation by collective labor, and members of the collective are not co-owners of its property. But collective property differs from state property in that its transfer involves alienation of ownership. Furthermore, transfers of goods from one state enterprise to another are effected by allocation in the form of either an administrative order or a planned contract, whereas between a state enterprise and a collective, or between two collectives, such transfers can only be made in the form of "commodity exchange," *i.e.*, by contract. Soviet civil legislation provides that

[6] The "five-anti" movement was, in effect, a mass purge of the Chinese business and industrial bourgeoisie carried out on the pretext of stamping out the five "poisons"—bribery, tax evasion, fraud, theft of government property, and theft of state economic secrets.

[7] *E.g.*, see *Jen-min Jih-pao* (Peking)—henceforth cited as JMJP—Dec. 15, 1954, p. 3.

[8] Wang Shu-wen and associate, "A Study of the system of Three-Level Ownership With the Production Brigade as Its Foundation in the Rural People's Commune," *Cheng-fa Yen-chiu* (Peking), No. 1, 1961, pp. 29-32; *Kuang-ming Jih-pao* (Peking)—henceforth cited as KMJP—Aug. 6, 1962, p. 4.

[9] Kuan Ta-t'ung, "On the Relationship of State Ownership to Collective Ownership," *JMJP*, Oct. 24, 1961, p. 7.

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a penalty based on the claims of creditors may not be applied to the fixed assets of collective organizations. In the Chinese case, the collective is also a juristic person and therefore can be sued; however, in the absence of a statutory law regulating these matters, its capacity to assume such a property liability is not at all clear.

The predominance of state and collective ownership of the means of production leads to the question: what is left for the individual to own? Art. 11 of the 1954 Constitution declares: "The state protects the right of citizens to possess lawfully-earned income, savings, houses, and the means of subsistence."

The continued existence of individual ownership in handicraft industry is considered a temporary phenomenon of the transition period. In reality, however, the wide variety of handicraft products has made it impossible for the regime to convert the entire industry to state or collective ownership and thus bring it under direct state planning. Consequently, the regime's present policy for this sector of industry calls for the "co-existence" of state, collective, and individual ownership, with collective ownership as the principal form.[10]

The Institution of Economic Contracts

Socialization of the means of production is based on the need for a planned economy. However, the economic plan is not self-executing: its successful implementation requires an instrument to translate its general principles into specific terms. This role is filled by the "economic contract," by which is meant the type of contract directly applied to implement the national economic plan. As a matter of practice, at least one of the parties to such contracts is a socialist organization. A contract between two individuals is accordingly not in this category.

Freedom of Contract.—In contract law, two elements are generally considered indispensable. The first is the existence of mutual agreement in the formation of a contract, and the second, the availability of a legal remedy in case of a breach or non-performance.

Both Chinese and Soviet lawyers have accepted this general definition as the basic approach to the law of contract. However, this does not mean that they follow the general contract rules familiar to non-Communist lawers. In Communist practice, the supremacy of plan over contract has seriously impaired the original nature of contract as an agreement between two free wills. On the ideological plane, the question boils down to what is meant by "freedom." In his *Anti-Dühring*, Engels asserted that "freedom is the appreciation of necessity." Soviet jurist Andrei Vyshinski once explained it by drawing an analogy with the freedom of members of an orchestra to play so long as they follow the directions of the orchestra leader.

Somewhat in accord with this interpretation, Mao, in his *Correct Handling of Contradictions Among the People*, defined freedom as a contradictory aspect of the unified Whole. Like "democracy," he said, freedom is not an end of the state, but a means to serve the interest of the economic base. Freedom can exist only under a centralized leadership; as a dialectical concept, it has its counterpart in organization: the people are "free" so long as they are organized under the leadership of the party.[11] Organization in turn demands discipline, which, in the Chinese socialist context, is defined as the embodiment of agreements, rules and systems established on the basis of collectivism and Communist ethics to guide the activities and conduct of individuals, enterprises, social groups, and government agencies in their community life. As such, socialist discipline is the antithesis of freedom, and its observance by the individual is a precondition of his freedom.[12] Observance of the state's economic plans is an essential part of socialist discipline. Contracts must therefore conform to the state plan, and the parties are free to negotiate terms only within the limits set by it. Thus, "freedom of contract" in Chinese Communist law is to be understood solely in the sense of state-guided or state-organized freedom.

The Role of Contracts.—Theoretically, the function of contracts under the system of ownership described above is threefold: (1) to carry out the national economic plan; (2) to

[10] "On the System of Ownership in Handicraft Industry and Its Production, Supply and Marketing," *ibid.*, March 2, 1962, p. 1.

[11] Ch'i Tso-wen, "On Organization and Freedom," *ibid.*, Dec. 6, 1958, p. 7.

[12] Hou Yung, "Socialist Discipline and Individual Freedom," *ibid.*, Nov. 19, 1957, p. 7.

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promote the socialist transformation of the capitalist and private sectors of the economy; and (3) to provide a means of effecting personal property transactions between individual citizens. Actually, the socialization of private property has progressively reduced the role of contracts between individuals to insignificant proportions. On the other hand, the application of contracts in the domain of national economic life is practically a state function entailing the regulation of business relationships in the socialist sector of the economy as well as the extension of state control over the activity of the non-socialist sector. The essentials of two of the most important types of economic contracts are as follows:

The first type is the "contract or order" (*yu-kou ho-t'ung*), which has a dual role. On the one hand, it is an agreement between socialist organizations (or, prior to 1956, between socialist organizations and individuals) for the purchase of future goods; on the other hand, it serves simultaneously as a means of collecting data required for putting together the national economic plan. The following illustrates this twofold function:

The All-China Federation of Cooperatives, on March 20, 1951, issued a regulation concerning the purchase of cotton from peasants. At the highest level, general agreements were concluded between the federation and the appropriate central economic ministries. On the basis of these agreements, order contracts were signed between the cooperative organizations and their government counterparts at each successively lower level. The cooperatives at each of these levels had their own specific responsibilities: those at the regional and provincial levels were to organize, supervise, and inspect the purchase of cotton; those at the special-district and *hsien* levels were to handle transport, specification, quality, weight, processing, storage, delivery, payment and goods supplied to peasants in exchange for cotton; and those at the primary level were to make contracts directly with the peasant producers, to work out the actual delivery procedure, to check the conditions and techniques of planting, and to help prevent insect damages in order to assure performance.

At the same time, moving upward from the bottom, the cooperative organizations at each level had reporting responsibilities. The primary cooperatives had the duty to report every ten days to the *hsien* cooperatives on the making, specific terms, and execution of contracts with cotton producers. The *hsien* cooperatives were to inform the appropriate local government officers as well as the provincial cooperative organizations on a semi-monthly basis, and the latter in turn were to make monthly reports to the regional cooperatives and the central federation. In addition, the lower-level cooperatives were required to report sample data, whenever available, to the higher cooperative organizations, with copies of their reports also going directly to the federation. Thus, in contrast to the Soviet contract of delivery, which is primarily used to execute the state plan, the Chinese contract of order appears to have an additional function in gathering data for national economic planning.

Another important type of economic contract employed in Communist China is the "contract of supply and purchase" (known by varying Chinese terms). In substance, it is a bilateral contract both parties to which are promisors as well as promisees. This kind of contract was officially approved by a party resolution of December 16, 1953, as a means of promoting agricultural collectivization. Through such contracts, authorized state agencies were to supply agricultural units with farm implements, fertilizers, and other means of production and subsistence in exchange for the latter's products. Conceived as an agreement for "product exchange," this kind of contract differs from the contract of order in that it is used primarily in the acquisition of products which are not in the category of "planned purchase" by the state (food, cotton, etc.). Furthermore, whereas a contract of order obligates the state to make an advance payment to the producers for the delivery of technical crops and major commodities, under a contract of supply and purchase the state merely supplies the producers with specified means of production and subsistence in exchange for certain commodities. However, both types of contract have one thing in common: they both provide the state with a means of exercising control over the plans of individual producers with respect to the acreage to be devoted to a specific crop, the quantity and quality of products, etc., bringing rural production into line with overall state planning.[13]

The importance of the contract of supply and purchase as an instrumentality of state economic control was re-emphasized by a joint resolution of the party and the State Council

[13] Kuo Hsien-jui, *Ju-ho T'ui-hsing Chieh-ho Ho-t'ung* (How to Develop the Contract of Supply and Purchase), Peking, Ts'ai-ching Ch'u-pan-she, 1956, p. 3 ff.

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of December 20, 1958, relating to the operation of the rural people's communes. A subsequent order of the State Council, based on a joint report of various government economic ministries, divided commodities into three major categories: Category I, embracing 38 items including food grain, cotton, oils, and other products vital to "national planning and the people's livelihood," which were to be under the direct and absolute control of the State Council; Cateory II, consisting of 293 items including hemp, meat, tobacco, wine and other "important" commodities, which were to be controlled by the individual ministries concerned according to the policy laid down by the State Council; and Category III, consisting of all items not included in the other two categories or specified by government regulations, these to be managed primarily by the Ministries of Commerce and Public Health. According to this classification, the appropriate agencies at each administrative level held periodic meetings to initiate contracts for the exchange of goods between socialist economic units. For Category I items, contracts were drawn strictly according to the state plan; for Category II items, they were based on a quota system fixed by the state; and for Category III items, they were made through negotiation.[14] Contracts falling in Category III are basically designed to consolidate the diversity of economic activities, especially in the area of handicraft and side-occupation production.

Under the provisions of a decree of September 27, 1950, disputes arising from a breach or non-performance of contracts between socialist organizations are to be referred first to the administrative agencies having supervisory power over the contracting parties for settlement and, if not resolved, then to the courts. In the Soviet Union, a system of special tribunals of state arbitration (*Arbitrazh*) has been operating since 1931 to resolve contractual disputes between state economic units. In China, however, such quasi-judicial organs have never been officially established, and even the role of the regular courts in this area remains extremely uncertain. Very few cases of contractual disputes have been reported in the Chinese press, and in all these instances the disputes were settled, and fines imposed on the breaching parties, by the administrative agencies concerned.[15] As in the Soviet Union, nonperformance of economic contracts has been rare, probably because of the fact that, under the regime's policy, payment of a fine does not release the delinquent party from fulfilling his contract obligation unless the plan assignment on which it was based has lost its force.

[14] Kuan Ta-t'ung, "On the System of Contracts for the Exchange of Industrial and Agricultural Products," *JMJP*, March 9, 1962, p. 5.

[15] For example, see *KMJP*, Aug. 9, 1952, p. 2.

Criminal Justice

Communist revolution by its very nature is an act of overthrowing the existing social order. It neither permits any legal interpretation nor indeed requires juridical regulation. As Lenin once said, the power of proletarian dictatorship is not restricted by law. However, law, as a means of social control, is also useful to the purposes of the revolution—that is, to introduce and consolidate the new order through elimination of the old. Thus, during the Stalinist era, law existed side by side with terror in the Soviet Union. What about Maoist China? Does a reign of terror exist there? To what extent is freedom of person protected by law? The following discussion of three key areas of the Chinese Communist system of criminal justice —*i.e.*, police control, corrective labor and counterrevolutionary crimes—may provide some answers to these questions.

Police Control.—It is common knowledge that one of the worst aspects of Soviet justice under Stalin was the exorbitant power of the state security organization (the Ministry of Interior, or MVD, and its predecessors), whose authority ranged from the registration of births and deaths and supervision of the regular police to the imposition, without court trial, of capital punishment or imprisonment in labor camps for political crimes. Consequently, one of the first post-Stalin reforms of Soviet justice was the abolition of the Special Board of the MVD (renamed the Ministry for Protection of Social Order in 1962) and the reallocation of its security functions to the Committee on State Security (KGB) of the USSR Council of Ministers.

In China, the Ministry of Public Security (MPS) performs the combined functions of the MVD and KGB with the assistance of the Ministry of Internal Affairs and other government agencies. Equipped with a sizable armed force, the MPS is in charge of political security, protection of economic information, police administration, census registration, naturalization, vital statistics, traffic control, border patrol, corrective labor, etc. It controls the work of subordinate departments of public security at all administrative levels, and it operates in close conjunction with party and military intel-

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ligence agencies on the one hand and mass organizations on the other. By a regulation of June 8, 1951, security offices responsible to the MPS were established in all government organs, political parties, social groups, factories, mines, enterprises, warehouses, and schools; many areas of state, economic, and social activity were classified as secret; and censorship of the press was officially installed.

A regulation of August 11, 1952, further created a Soviet-type mass security organization consisting of so-called Committees for the Protection of Social Order,[16] which were established in all political, economic, and social units, including urban streets and rural villages, with the duty of assisting the regular organs of public security in combating traitors, spies, counterrevolutionaries, and criminals. Hotels and places of public entertainment were required (MPS regulation of August 15, 1951) to report the activities of "suspicious persons" to local security organs. Private businesses dealing in radio equipment, firearms, poison stuffs, printing, carving, and engraving were all placed under security control (MPS regulations of August 3 and 15, 1951, and July 23, 1955). Since the nationalization of private industry and commerce in 1956, operators of these businesses have had the status either of government employees or of members of collectives and as such are under the normal jurisdiction of the regime's security apparatus.

The People's Police Act of June 25, 1957, reconfirmed most of the powers and functions of the public security organs as described above. Moreover, the Organic Law of the People's Procuracy (September 28, 1954) legally empowered these security organs to place a charge before the procurator's office at the next higher administrative level in cases where they were dissatisfied with the decision of a lower procurator's office not to approve their demand for a person's arrest or not to prosecute a case they had referred to it (Art. 13). Hence, the MPS not only controls individual activity but also can intervene in the judicial process. However, there does not appear to be any formal legal sanction empowering the MPS, as its Soviet counterpart was empowered under Stalin, to impose death sentences without a court trial.

Corrective Labor.—One of the many charges which Soviet propaganda organs have hurled at the Chinese in the course of the Sino-Soviet dispute is that Chinese Communist legal practices, in particular the large-scale and arbitrary application of corrective labor, are tantamount to a "violation of socialist legality." An editorial in the Soviet government organ *Izvestia* declared, for example:

In the vigorous movement against so-called "rightists and right-leaning opportunists," large-scale suppression was carried out. On August 1, 1957, the State Council of China passed a decision concerning reeducation and accommodation through labor. This decision granted administrative agencies the power to confine almost any Chinese citizen indefinitely in special camps without investigation and trial. . . Several hundred thousand people were thus suppressed. In substance, if this is not a gross violation of the elementary democratic rights and freedoms of citizens, what else is it? [17]

While no one would take issue with *Izvestia's* criticism, the fact is that the Chinese Communist application of forced labor differs little, if at all, from the Soviet Stalinist model. In his *People's Democratic Dictatorship,* Mao Tse-tung endorsed the Stalinist theory of law and state and expressed his determination to reform undesirable elements through forced labor. Since the founding of the regime, many thousands of people have indeed been sent to labor camps by the MPS without formal charges and trial. An administrative regulation of September 7, 1954, formally authorized the establishment of four types of labor institutions for the reform of convicted and "not-yet-convicted" counterrevolutionaries and criminals as well as juvenile deliquents. Like Stalinist law, Peking's jurisprudence denies the "presumption of innocence" and places the burden of proof squarely on the shoulders of the accused; hence, criminal suspects are referred to as "not-yet-convicted" persons. Such persons, together with those sentenced to imprisonment for not more than two years, are to be reformed through labor in "detention houses" (Art. 8). Counterrevolutionaries and major criminals sentenced to life imprisonment and who are not suitable to perform labor outside prison walls, are to be consigned to work in penitentiaries (Art. 13). Other counterrevolutionaries and criminals are to undergo reformation in special work brigades (Art. 17), and juvenile deliquents in youth re-

[16] Similar organizations have existed in the USSR since the 1920's; see Harold J. Berman, *Justice in the USSR,* New York, Vintage Books, 1963, pp. 285-8.

[17] Translated from the Chinese version of the *Izvestia* editorial ("On Proletarian Dictatorship," May 17, 1964) as published in JMJP, July 13, 1964, p. 8.

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formatories (Art. 21). The operation of all these institutions is under the jurisdiction of the state security organs (Art. 6), and the labor force which they control fulfills tasks assigned under the general state plan for production and construction (Art. 30).

On August 3, 1957, the State Council announced a new regulation extending the application of corrective labor to several additional categories of persons, as follows: (1) vagrants and hooligans, persons who commit theft or embezzlement without being held criminally responsible, and those who violate social controls and fail to change their conduct after repeated warnings; (2) counterrevolutionaries and "anti-socialist reactionaries" who commit minor offenses not subject to criminal punishment, persons dishonorably discharged by government organs, social groups, enterprises, and schools without other means of living; (3) employees of government organs, social groups, enterprises and schools who shirk their duties for a prolonged period, breach discipline, or endanger public order; and (4) persons who refuse to accept officially-assigned employment or to engage in some form of productive labor, or who engage in disorderly conduct without reason, obstruct the performance of official duties, and fail to change their conduct after repeated warning.

The regulation (Sec. 3) provided that offenders falling in any of these categories could be committed to a labor camp at the request of local public security organs or departments of civil affairs (under the jurisdiction of the Ministry of Interior), or at the request of the offenders' employers, family heads, or guardians with the approval of the appropriate local administrative authorities. Operation of the camps is a function of the public security organs. Persons undergoing reform through labor are entitled to receive wages, but periods of confinement are indefinite. Article 30 of the Penal Act for the Control of Social Order (October 22, 1957) exclusively empowers the public security organs to commit violators of the act who are unemployed and living a vagrant life to labor camps for an indefinite period.

At the time the State Council regulation and the Penal Act of 1957 were promulgated, they were primarily aimed at the "rightists" who had emerged during the shortlived "hundred flowers" movement. In the longer run, however, they are also directed at vagrants and hooligans and thus are comparable to the measures adopted in the Soviet Union in recent years whereby anti-social and "parasitic" elements may be subjected to administrative "resettlement" and compulsory labor on state development projects.

Counterrevolutionary Crimes.—Treason, espionage, sabotage, and the like are severely punished everywhere in the world. The Communist concept of "counterrevolutionary crimes," however, is far broader in scope than the usual concept of offenses against the state. It was first embodied in the Soviet Criminal Code of 1922, elaborated at length in Article 58 of the 1926 Criminal Code, and finally revised by the 1958 Law on Criminal Responsibility for Crimes Against the State. The 1958 law, while narrowing the definitions of certain anti-state crimes, does not reduce their number. In substance, they are divided into two groups. The first embraces high treason, espionage, terroristic acts, wrecking of socialist property, sabotage, anti-Soviet agitation and propaganda, and the organization of activity for the purpose of committing especially dangerous state crimes. The second includes violation of national and racial equality; the divulging of state secrets, banditry; smuggling; participation in mass disorders; evasion of military service, mobilization, or wartime service; evasion of taxes; illegal exit from or entry into the USSR; infringement of international air regulation or regulations governing transport traffic and operations; damaging of communications and means of transport; the preparation and passing of counterfeit money or securities, infringement of currency regulations; and failure to report anti-state crimes. Penalties for the offenses listed range from fines and imprisonment to death, with or without confiscation. Broadly interpreted, this law almost has the character of a universal penal code.

The Chinese Communist Statute for the Punishment of Counterrevolutionaries (February 21, 1951) contains virtually the same provisions, but with greater ambiguities and severities. Article 16 permits punishment by analogy, which was abolished in the 1958 Soviet criminal legislation. Article 18 allows the retroactive application of the statute to "counterrevolutionary crimes" committed before the "People's Government" came into existence. The same feature formerly existed in Soviet law but was supposedly abolished by the legislation of 1958, although (as discussed elsewhere in this issue) there was an actual case in 1961 in which a new Soviet law extending the death penalty to certain economic crimes was applied to two citizens whose offense antedated the law.

Before 1958, there was nothing in Soviet legal doctrine to bar *ex post facto* legislation

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punishing acts which were legal at the time of their commission. Article 58 of the 1926 Soviet code, for example, repeated a provision of the 1922 code prescribing the death penalty for any former leading member or agent of the Tsarist police. A similar provision with respect to former Kuomintang officials and others appeared in Article 7 of the Chinese Statute of 1951. This, however, was moderated somewhat by an MPS regulation of July 17, 1952, which provided that persons who had committed counterrevolutionary crimes before 1949 and had since shown no evidence of reforming themselves should be merely "controlled" (*kuan-chih*) if their past offenses were not serious enough in degree to warrant their arrest and if they were no longer guilty of any active counterrevolutionary conduct. These provisions apply not only to former military, police, and civil officials of the Nationalist government, but also to former cadres of the "reactionary political" parties, ex-chiefs of secret societies, and ex-landlords. "Control" involves deprivation of political rights and constitutional freedoms and the obligation to perform compulsory labor. The period of control is limited to a normal maximum of three years, but can be extended if deemed necessary. The power to impose this form of punishment was first vested in the public security organs but was later restricted exclusively to the courts by a decision of the National People's Congress of November 16, 1956. The decision coincided with a further reduction of penalties for certain types of counterrevolutionaries, but the effect of both these moderating actions was soon nullified by the State Council decision on reeducation and reform through labor and the 1957 Penal Act, already discussed above.

Judging from both the content of the 1951 statute and its subsequent practical application, it is obvious that, in addition to all the dangerous aspects mentioned above, the main hazard of this law lies in the lack of a precise definition of what is to be considered "counterrevolutionary." Article 2 of the statute labels acts aimed at overthrowing the "people's democratic government" or destroying "the people's democratic undertakings" as counterrevolutionary crimes, but exactly what the latter "undertakings" include is not defined. Because of this ambiguity, the law can always be interpreted in borderline cases to suit party policies. In the early 1950's, when the regime was in a hurry to impose the new social order, landlords, gangsters, and hooligans were shot as "counterrevolutionaries.[18] In 1953, when the regime was striving to enforce the planned purchase and supply of grains, food speculators suffered the same fate.[19] Later, as the socialization of industry and agriculture gathered momentum, "wreckers of economic construction" were executed without appeal.[20] In 1955 alone, 81,000 persons were reportedly convicted as counterrevolutionaries, and another 190,000 were reported to have surrendered to the regime during 1956-57.[21] During the "hundred flowers" movement of early 1957, the public was officially exhorted to criticize bureaucratism and other shortcomings within the government and the party, but when the criticism reached alarming proportions, the regime unleashed an "anti-rightist" campaign during which many of the critics were punished as "reactionaries." The regime has since boasted that a "great victory" has been achieved in reforming undesirable elements, and it has granted amnesties to some imprisoned "counterrevolutionaries." [22]

Over three decades ago, the dean of the Soviet legal profession, Eugene B. Pashukanis, identified law with policy. Peking has implicitly embraced this doctrine both in theory and in practice. In fact, the Chinese Communist system of law and law enforcement today still bears a remarkably close resemblance to the Stalinist model which inspired it. As for the future, so far as one can judge, it appears likely that justice in Communist China will continue to depend, above all, on how the wind blows in party policy.

[18] See, *e.g.*, *ibid.*, May 5, 8, and 23, 1951.
[19] *Ibid.*, March 7, 1954, p. 3.
[20] *Ibid.*, Aug. 21, 1954, p. 3.
[21] *Ibid.*, July 18, 1957, p. 1 (editorial).
[22] *Ibid.*, April 10, 1960, p. 3; Dec. 17, 1961, p. 1; April 10, 1963, p. 1.

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EASTERN EUROPE:

Legislative Trends

By Kazimierz Grzybowski and Jonathan L. Alder

One of the important characteristics of the so-called socialist states is their vast output of laws.[1] In large part this is undoubtedly the result of the fact that, although socialist jurisprudence limits the power of lawmaking to representative organs of the "people's power" (such as the soviets or people's councils or national committees), many laws actually emanate from other sources, including pronouncements of the party leadership and directives of executive agencies of the government. Indeed, this latter form of legislation sometimes far outweighs in importance the laws derived from formal legislative sources.

The general effect of this approach to lawmaking is an enormous proliferation of legislative acts. By 1960, the number of so-called normative acts currently binding upon Polish courts in civil law alone, for instance, was found to exceed more than 10,000. The reorganization of economic management in Yugoslavia in the period 1950-53 brought about the repeal of more than 800 decrees enacted by the federal authorities, close to 600 decrees enacted in Serbia, about the same number in Croatia, and a similar number of legislative enactments in other republics and autonomous territories of the Yugoslav federation. It is not surprising, therefore, that the political thaw following the death of Stalin materially affected the legislative output in Eastern Europe. Legal reform, which is a constant phenomenon in the socialist states, has received a new perspective and ideological meaning.

Broadly speaking, all countries of Eastern Europe have experienced two stages in their post-Stalin development. The first was characterized by a relaxation of controls, a more genuine participation of the people in the affairs of government, a greater concern for the standard of living of the masses, higher standards of performance by the social services, and a more effective participation of factory workers in the

[1] For the purposes of this article, the term "socialist" will be used in reference to the institutions of the USSR and the other Communist states of Eastern Europe.

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management of national industries. At the same time, public opinion found an outlet for expression within the official machinery of the state. This period was followed by a second stage in which controls were reintroduced. The ruling regimes were strengthened, alien bodies, which had been created to give expression to democratizing tendencies, were reintegrated into the general apparatus of the state, and stricter social discipline was re-established. The overall effect was to reintroduce into government and social management centralized bureaucratic controls.

Although in historical perspective these two stages are clearly visible, it would be futile to look for parallel legislative developments throughout Eastern Europe either in time, or in the contents of enacted legislation. Despite the fact that pressure for change existed everywhere, public opinion about the priorities for social reform varied from country to country depending on historical factors such as the degree to which Stalin's regime had been imitated locally, the level of industrialization, and the standard of living, to mention just a few.

Finally, note should be taken of the interaction of pressures for reform from below with equally genuine, though different, interest in change at the top of the ruling regimes. While the liberalizing changes in Eastern Europe were due mainly to popular demand, there was also opposition in the highest party and government circles to some of the features of the Stalinist order. There was resentment of the highhandedness of the Soviet advisors in the armed forces and in the security apparatus, of the control of economic life from Moscow, and of the absence of genuine agreement, compromise and discussion in shaping the common policies of the Soviet camp. Economic experts were also aware that Soviet economic planning and managerial methods were ineffective and resulted in waste and economic stagnation; discipline, they thought, had to be combined with initiative and cooperation from below. In short, the recent economic and political reforms in Eastern Europe were the result of a general conviction that Stalinist methods of control and planning were not only morally abhorrent, but had outlived their usefulness and become an obstacle to further progress.

Civil Law

The East European people's democracies had come into being with the idea that civil codes constituted an important instrument of social and economic reconstruction and that a state based on socialist principles needed a code to govern its property relations. Consequently, civil legislation figured early on the calendar of legal reform.

The actual course of the codification efforts under the Communist regimes varied from country to country, depending upon local conditions and the existing civil legislation. In Poland, drafts of civil laws prepared in the interwar period were hastily enacted in order to unify a country which faced great social and economic problems due to the geographical shift of its area and the westward migration of millions of Poles from the Soviet-annexed eastern territories. In Czechoslovakia, the new civil code supervening the old Austrian and Hungarian codes gave the Czechs and the Slovaks their first common body of civil law.

In Hungary, the enactment of the 1959 Civil Code represented a realization of a long-standing ambition. The only period during which the Hungarians had previously had a civil code was after the defeat of the 1848 Revolution when Emperor Francis Joseph extended the rule of the Austrian Code of 1811 to Hungary. Until then the country had lived under a common law system shaped by court decisions and centuries of traditions. With the end of absolutism in 1867, the Hungarians repealed the Austrian Code, returned to the common law, and from that time until 1959 had been engaged in drafting a civil code of their own.

The situation was different in Bulgaria and Albania, which began their march to socialism with full-fledged prewar civil law systems of their own. Their new civil legislation, adopted after World War II, was prepared with little expertise and legislative skill, in slavish imitation of the Soviet system. In Albania, the 1928 Code, which was a modern piece of legislation, was replaced by a series of fragmentary laws which were given shape as an integrated code only in 1957. In Bulgaria, all former civil laws were repealed and replaced by new legislation, such as the property law of 1951, the law on inheritance of 1949, or the law on Persons and Family of 1949. These laws were generally a faithful imitation of Soviet models and failed to take root in Bulgarian reality. In 1960, the regime in Sophia set up a civil law codification commission and charged it with the preparation of a systematic code of civil law and the reorganization of Bulgarian civil law. As in other countries of Eastern Europe, constant changes in economic administration have produced a great number of regulations and governmental edicts which complicate the legal situation and which need to be trimmed in order to permit a

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freer hand in business operations and greater stability in property and contractual relations.

Rumania, whose civil code is a copy of the French civil code, has limited its reform of the civil laws to amendments that cover the legal problems resulting from the nationalization of industrial and commercial enterprises, the institution of governmental monopolies, and the collectivization of agriculture and artisan activities.

A still different approach to civil law reform was adopted in Yugoslavia. During the interwar period, the Southern Slav Kingdom maintained in use a mosaic of native and inherited codes, including foreign legal systems used in the provinces that were absorbed by Yugoslavia after World War I. In 1946, a law was passed which repealed all laws enacted prior to April 6, 1941, and during enemy occupation of the country. This revolutionary measure gave the government and the Yugoslav courts a free hand to reorganize the economic and social life *via facti,* rather than with reference to new laws and regulations—an approach that was expedient from the point of view of the revolution, but hardly conducive to orderly government. Since 1949, however, the output of new laws has been quite impressive, and at the present time the Yugoslav federal legislation covers all major fields of civil law relations.

The spirit of postwar legislative activity in Yugoslavia varied in accordance with the temper of the times. The Tito regime began as a rigid imitator of Stalin's ways, and its early legislation was quite orthodox in the Soviet sense. Nationalization of the economy, the institution of central planning and the collectivization of agriculture were modelled after Soviet patterns. The 1948 rift with Moscow, however, subdued this tendency, and the Yugoslav peasant, in particular, has been freed from collectivization pressures. This new political turn found its expression in a number of laws which relaxed restrictions on the sale and cultivation of land, assured the protection of private property and recognized the right of inheritance.

The spirit of opposition to Soviet solutions in the field of civil law legislation was expressed in enactments which dealt with commercial transactions of economic institutions controlled by the national economic plan. In 1954, the State Court of Arbitration of the Yugoslav Federation adopted a set of rules, under the name of "General Usages of Trade," for the adjudication of disputes arising from business dealings of economic organizations. This enactment represents the first example of a code of commercial transactions in a socialist society and it has been of considerable importance for civil law reforms in the rest of Eastern Europe.

Thereto, the original tendency had been to imitate Soviet methods. Contractual relations between governmental enterprises were tied to the economic plan, and a rigid system of planned contracts was imposed upon industrial and trading concerns. Such contracts were considered *sui generis* administrative acts, having nothing in common with commercial transactions as they are commonly understood. In the post-Stalin era, however, it was recognized that further industrial development required a measure of freedom in contractual relations between government enterprises. This realization contributed significantly to the growing importance of civil law regulations in general and of the rules of commerce in particular. As a result, Czechoslovakia enacted on October 17, 1958, the law on "business relations between socialist organizations." Rumania adopted a law on the "general rules of commerce" that same year. This new legislation not only reflected a more liberal attitude towards contractual relations between socialist enterprises, but also took account of the greater powers given at the time to enterprise directors.

In Poland, an act of the Sejm (parliament) of April 23, 1964, unified and reorganized the whole system of Polish civil law. A number of superannuated laws, rendered obsolete by the social and economic changes in Poland, were abolished, while some provisions of the old commercial code were incorporated into the Civil Code, to govern contracts between socialist enterprises as well as foreign trade transactions. The enactment of the Polish Maritime Code of 1961 was another demonstration of the new attitude towards the law of commercial contracts in the former Soviet satellites.

There is, however, a vast difference between the role of the law of commercial transactions in Yugoslavia and in the other Communist countries in Eastern Europe. The Yugoslav law of socialist commerce operates in an economy in which the free market and state planning coexist and influence each other. While Yugoslavia, after breaking with Stalin and his concepts of national economic management, had reorganized in 1950-53 its economic administration and assigned control of business operations to workers' collectives, the countries remaining

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in the Soviet bloc have kept the principle of centralized planning substantially intact.

Furthermore, in 1954 Yugoslavia enacted the Judiciary Act which transformed the existing government arbitration boards into a system of economic courts with functions similar in essence to commercial courts in the civil law countries of Western Europe. The presiding judge of the Supreme Economic Court of Yugoslavia explained the action as follows:

The reason for converting the State Court of Arbitration into economic courts lies in the changes instituted in the Yugoslav system of economy and planning. The new economic system, whose hallmarks include the economic and legal independence of economic enterprises, the management of factories and enterprises by the working collective and the fixing of the rights of economic organizations, has made it possible for economic organizations to appear independently on the market, which fact, in turn, has had the effect of expanding the role of law in regulating mutual property relations and strengthening the role of law in that domain.[2]

The East German situation, too, has its peculiarities. At first, for the sake of maintaining the fiction of the legal unity of the two Germanies, the general tendency was to avoid tampering with the existing German legislation, except where it was incompatible with the new political conditions. It was only later, when the concept of East Germany as a separate state became an axiom of Soviet policy, that the idea of building up an East German socialist civil law system gained currency. A proper codification commission was established and it became immediately involved in a problem of great theoretical interest: Whether to preserve the unity of the civil code or whether to enact a series of separate laws determining legal relations in the various economic sectors, including the private economy, the socialized sector and agriculture? This question was at one time hotly debated in the Soviet Union and Poland, and those who favored the more traditional approach won, mainly on the strength of the argument that a uniform civil code is favorable to foreign trade since it makes it easier for foreign courts to apply local (Soviet or Polish) law when the occasion arises. It seems, however, that it will take some time before East Germany has a civil code of her own.

In general, the recent trend in civil law legislation in Eastern Europe is towards greater attention to local traditions irrespective of the patterns established by Soviet practice and slavishly imitated in the past. The Hungarian Civil Code of 1959 is perhaps most significant in this respect. It provides, for example, for a far broader circle of legal heirs than any other inheritance law in the Communist world. The main feature of the Hungarian inheritance system is the lifetime interest of the spouse in the entire estate even though children of the deceased may seek restriction of this right if the needs of the surviving spouse are met from other sources. Similarly, contrary to other civil law legislation of the Soviet type, the Hungarian code maintains the right of adopted children to inherit from their natural relatives, while at the same time according such children full inheritance rights with respect to their adopted parents. Furthermore, there is in the code no restriction of testamentary disposition in the selection of heirs, or their shares, except for the institution of statutory shares which obligatorily devolve upon certain statutory heirs. All statutory heirs, such as children or brothers and sisters, are entitled to half of what would devolve on them under the system of statutory succession.

Administrative Decentralization

Another of the characteristics of Soviet-type socialist statecraft is the reliance on centralized government and public administration. The modern state in the West has responded to the needs of present-day life by the pragmatic expansion of functions of local self-government and local economic and social organizations rendering public services. This polycentric system, in which public authority is shared and exercised by a number of official and semi-official bodies, has several obvious advantages: it contains a large number of safety valves for the release of social pressures; it allows local initiative to solve local problems; and it makes for elasticity in the governmental and unofficial channels through which social life flows and public functions are discharged. In a state of the Soviet type, this flexibility is absent because a rigid integration of all social and economic institutions in the state bureaucratic structure easily results in upsets and disorganization whenever one of the components of the government apparatus finds itself unable to perform its functions.

Much of this had been learned through bitter

[2] Alexander Goldstein, "The Economic Courts," in *The New Yugoslav Law*, July-December, 1954, p. 16.

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"Socialist Legality" in Poland:

ON NOVEMBER 9, 1964, a Warsaw court convicted Melchior Wankowicz, distinguished 72-year-old Polish writer, on charges of "preparing and transmitting abroad for publication material containing false and calumnious information on the situation in Poland." The court imposed a sentence of three years' imprisonment, reduced to 18 months under an amnesty decree of last July. A subsequent appeal by Wankowicz was rejected by the Polish Supreme Court, but as of last report (early March) he apparently had not yet been imprisoned.

The Wankowicz trial was highly significant on two counts. First, it was directly connected with the rebellion of an important segment of the Polish literary and intellectual community against the increasingly restrictive cultural policies pursued by the Gomulka regime since 1963. Second, it convincingly demonstrated the limited nature of post-Stalinist legal reforms in Poland.

Although not a principal leader of the revolt, Wankowicz had clearly identified himself with it. At a session of the Central Board of the Polish Writers' Union in January 1964, he had been among the liberal spokesmen who strongly criticized the new cultural directives. A few months later he had also been one of the 34 prominent writers, poets, and scholars who signed a joint letter to Premier Jozef Cyrankiewicz protesting reduced paper allocations and stricter censorship controls and calling upon the government to change its cultural policy in accordance with "the rights guaranteed by the Polish Constitution." Personally delivered by Antoni Slonimski, its reputed author, on March 14, 1964, this document soon became a *cause célèbre*.

Although the government suppressed any mention of the "Letter of the 34" in the Polish press, news of the protest leaked abroad, where it was widely reported in the press and by Radio Free Europe. The government further aggravated the situation by initiating reprisals against a number of the letter's signers, including a ban on further publication of their writings or any appearances by them on radio and television. The reprisals aroused wide public sympathy for them at home, as well as a wave of condemnation abroad. In an effort to save face, the government managed to induce ten professors who had earlier signed the "letter of the 34" to address a letter to *The Times* (London) deploring the anti-Polish "campaign" abroad as the product of false propaganda by Radio Free Europe and the West German press, and denying knowledge of any reprisals. This letter appeared in *The Times* on April 28 but did not abate foreign criticism.

The next development came at a meeting of the Warsaw chapter of the Writers' Union in June. In an unexpected and daring speech, Maria Dabrowska, a signer of the "letter of the 34," scathingly criticized the regime's vindictive response and enumerated in detail the reprisals that had been taken against a number of the writers involved. Wankowicz had prepared a draft of a similarly critical statement, but he himself did not speak, apparently feeling that Madame Dabrowska had fully stated the writers' grievances. He did, however, transmit a copy of this draft to his daughter living in the United States, and certain extracts from it were later broadcast by Radio Free Europe. This provided the whole basis for his arrest and trial.

WANKOWICZ' EARLIER Western associations provided the government with a convenient basis for "proving" that the stories circulated abroad were mere propaganda fabricated by Radio Free Europe and the foreign press. He had left Poland in 1939 for the West, winning distinction there for his reportage on the war. In 1949 he had moved to the United States, finally returning to Poland in 1958. While in the US, he had become a naturalized American citizen and at one time had been subsidized by Radio Free Europe. Never a Marxist, he had not joined the party after returning to Poland.

Wankowicz was charged under Art. 23 of a 1946 decree "on especially dangerous crimes during the period of reconstruction," which provided for a minimum penalty of three years' imprisonment for anyone "who disseminates or, for the purpose of dissemination, draws up, conceals, or conveys written materials, printed matter or pictures inciting to the commission of a crime or approving of a crime, or the contents of which are intended to be kept secret from the state authority, or which contain false information that could cause material harm to the interests of the Polish state or could detract from the authority of its chief institutions." This measure, it should be noted, had been enacted at a time when there was still active internal opposition to Communist rule and had originally been intended to permit the summary repression of anti-government propaganda activity inside the country. Its

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The State versus M. Wankowicz

arbitrary character was underlined by the fact that it authorized punishment of mere preparatory acts without the actual commission of a crime, and even without any intended or actual injury to the state.

Despite the invocation of this outdated Stalinist measure, there was an evident effort to give the trial an appearance of scrupulous "socialist legality." The case was tried in a court of general jurisdiction under normal trial procedures, implicitly manifesting the government's resolve not to revive the special and secret tribunals of the Stalinist era, formally abolished after the October 1956 "revolt." The court allowed the accused every opportunity to prepare his defense, even recessing for a week to give him and his three personally-chosen attorneys more time to marshal their case. The accused himself was permitted to testify freely and conducted his defense with impressive eloquence.

This display of seeming judicial fairness, however, was belied by the elaborate steps taken to assure that the trial would receive a minimum of publicity. Admission to the courtroom was rigidly restricted; those in attendance never exceeded 30 and consisted mainly of the participating lawyers, a number of secret police, representatives of the Writers' Union, and a few handpicked members of the defendant's family and circle of literary colleagues. In fact, "the public" in the true sense at no time numbered more than about ten persons, and they were enjoined not to disclose what went on in the courtroom. Western news correspondents were entirely excluded, while coverage in the officially-controlled Polish press was restricted to what the government saw fit to announce.

ABOVE ALL, the government's decision to try Wankowicz under the 1946 decree virtually prejudged the case from the start—as was evident from the fact that the prosecution saw fit to call but a single witness, an officer of Polish intelligence, who testified in closed session. (Four witnesses, all writers, were called by the defense.) The prosecution's case was, indeed, ridiculously simple inasmuch as the basic facts—namely, that Wankowicz had prepared the draft statement in question and transmitted a copy of it to his daughter in the US; and that, as a result, the statement had come into the hands of RFE, which broadcast parts of it—were not in dispute. On the crucial question of intent, the prosecution cited Wankowicz' admission at one point in his pretrial interrogation that he had meant his statement to be made public, although the investigation report also showed that he had first denied it. The prosecution further contended—without offering any concrete proof—that certain allegations of fact made in the statement were false; and, finally, that the exploitation of the statement by RFE had materially harmed the Polish state.

The case for the defense took two lines. First, it argued that the 1946 decree had been enacted as an emergency measure and as such had dispensed with certain requirements essential to the rule of law; but that it was no longer properly applicable at a time when the "people's state" was firmly established and justice was supposedly based on socialist legality. Second, as to the statement itself, the defense showed that Wankowicz had made notations on the copy sent to his daughter giving her to understand that it was to be shown only to "old friends" (*kuliki*) and not to be published. The defense also denied that the statement constituted "false information," contending that it represented honest criticism motivated not by hostility but by devotion to the best interests of People's Poland. Finally, it was shown that Wankowicz had never written any material for RFE and had broken off his connection with that organization long before his return to Poland.

These arguments made no impression on the court. It ruled that the 1946 decree remained in force and was fully applicable to the case. It accepted at face value the prosecution's contention that Wankowicz' statement contained "false and slanderous" information, and that he had "disseminated" it with conscious intent that it be used for propaganda purposes. Finally, the court held that its utilization by RFE, a hostile agent, had damaged Polish state interests and constituted conclusive proof of the commission of a criminal act under Art. 23 of the 1946 decree.

The fact that Wankowicz still remains at liberty despite his conviction would seem to suggest some second thoughts on the part of the Gomulka regime concerning the wisdom of its repressive measures. This, however, does not lessen the importance of the recent trial as a demonstration that "socialist legality" can still be twisted to serve the political purposes of a Communist state.

K. G.

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experience and the death of Stalin opened the gates to experimentation with various forms of public administration. The most radical in the entire area was the Yugoslav experiment, which preceded Stalin's demise and provided considerable inspiration for later similar efforts, sometimes organized along different lines, in other Communist countries.

Immediately after World War II Yugoslavia had of course copied the Soviet example as all the other Soviet satellites. The now condemned period of administrative rule was characterized by an extreme centralization of economic planning and administration. Individual enterprises were classified into three categories—federal, republican and municipal—and placed under federal, republican or municipal "administrative-operative" management charged with all the planning, organization and legislation within its sector. Managers of individual factories had little power over matters of policy and were confined to strictly administrative functions; workers and employees had little if anything to say in the running of their enterprises. This system of economic management called for an ever-increasing number of specialized administrations at the center. At one time, there were under the Federal Ministry of Industry no less than twelve bureaus for the management of various industries. Later, the Ministry of Industry was split into two ministries: one in charge of heavy, the other in charge of light industry, and the number of central bureaus was again increased.

Tito's break with Stalin gave rise to criticism of the system, and it became clear that a new approach to economic administration was needed if the country and its economy was to avoid stagnation and the despotic rule from the center that characterized the Soviet Union. It was necessary therefore to relieve economic activity from undue interference of government organs and to draw a practical conclusion from the Marxist view that economic assets constitute social and not state property. The logical solution was to give the power over economic resources to the producers themselves.

After a period of experimentation, two laws —the Constitutional Law of January 13, 1953, and the law on People's Committees of January 1, 1952, later amended by the law of June 8, 1953—reorganized the entire governmental machinery of Yugoslavia, providing for a considerable degree of democratization and decentralization. In the first place, all representative bodies—national assemblies on the federal and republican levels, as well as local councils—were expanded by adding second houses, or councils, elected by producers according to their collective contribution to the national product. At each level the two houses have joint authority in all economic and related matters, including labor and social security questions The higher bodies—federal and republican—act as planning and legislative organs, while local councils have administrative functions and are the immediate superiors of individual enterprises.

The essence of the reform lay in the new managerial regime of individual enterprises, consisting of plant directors, workers' councils and administrative boards elected by the workers. The enterprises are managed by a director. Before the enactment of the 1963 Constitution, the director was selected by the workers' council and then approved by the local People's Committee or, in certain cases, by a Republican Executive Council or the Federal Executive Council. Under the new constitution, however, the director is "named" by the workers' council after being proposed by an appointments commission composed of workers, on the one hand, and members of the Municipal Assembly, on the other. The final managerial responsibility of the workers' councils continues autonomous and unhindered so long as it does not interfere with the rules and regulations issued by the government or with what the regime regards as the general interests of the community. Thus, the right to issue the general regulations governing industrial management and to determine the extent of the general interest of the country is reserved for the federal authorities.

The Yugoslav experiment caused considerable interest in Poland and Hungary and in the fall of 1956 it seemed to offer a logical alternative to the bureaucratic mismanagement of their national industries. At the same time, direct control of industrial enterprises by the workers promised to infuse a more democratic spirit into industrial relations and the processes of government in general. It was thus natural that in the turbulent days of October 1956 workers' councils sprang up in most industrial enterprises both in Hungary and Poland.

The legislation on workers' councils enacted in both countries in November 1956 merely ratified the revolutionary *fait accompli.* The councils, elected by factory employees, took over the direct management of enterprises and as such became part of the national economic administrations. They were subordinated, however, to higher levels of economic management

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and to the industrial ministries of the central governments. In Poland, the enterprise director was an ex-officio member of the council and had to report to it and give effect to its directives.

The undoing of the workers' councils in Hungary and Poland was in part the fact that they were the only democratic element in the entire structure of state economic administration and subordinated to an enormous bureaucratic machinery at higher levels. But, even more important, they represented democratic political organs beyond the direct and complete control of the ruling Communist party, and were thus unacceptable in both theory and practice to both Communist regimes. Accordingly, the councils were done away with as soon as the governments in Warsaw and Budapest recovered their equilibrium. In Hungary, a new law was enacted by the end of 1957, which replaced the workers' councils with shop committees devoid of any managerial responsibilities. In Poland, legislation passed in 1958 also deprived the councils of their managerial functions and paralyzed them politically by integrating them with the party-controlled trade unions.

However, in spite of this regressive trend in Poland and Hungary, all the European Communist regimes realized that their governments' survival depended upon a measure of consent from the politically articulate working class in their countries and that, therefore, some changes in the administrative establishment were necessary. The new pattern was to permit the population token participation in public affairs and economic management while avoiding any real surrender of central control over planning, investment and working conditions. Thus in 1957, East Germany introduced a form of workers' councils, though limited in competence mainly to social welfare questions, in her industrial establishments. And in 1961, Czechoslovakia put into effect a new law on factory committees, enlarging their functions and strengthening their position.

At the same time, the Communist regimes of Eastern Europe went ahead with minor experiments in the field of public administration, endowing with somewhat larger powers the people's or national committees in charge of provincial and local government. In Poland, a new 1958 law gave these committees greater control over their executive branches, while at the same time enlarging the scope of local affairs subject to their jurisdiction and decision. A similar partial reform was effected in Czechoslovakia where the administrative system had been characterized by a high degree of centralization. Among other measures, a constitutional law gave a larger role to the legislature and government of Slovakia, which until then was almost totally subject to fiat from Prague. Similar reforms were also introduced in Rumania.

The 1958 Czechoslovak experiment with decentralization deserves closer attention. The Czechoslovak regime endeavored to balance in a new fashion a measure of decentralization demanded by considerations of efficiency and flexibility with centralized control of planning and overall economic development. The broader powers of control over local industry granted local government bodies, were accompanied by some decentralization of economic administration. The central industrial administrations, corresponding to the Soviet *glavki*, were abolished, and related enterprises were more closely integrated into industrial combines, which, together with individual plant administrations, were given broader powers both in policy-making and daily management. The role of factory committees at the lowest level of plant administration was also considerably increased.

At the present time, Czechoslovakia is at the threshold of a new economic reform. The regime announced that the existing system of directing the economy is obsolete and that the 1958 reforms proved to be a failure. As a result, the party leadership approved the blueprint for a far-reaching reorganization of industrial management, based on profit-determined cost accounting principles, a flexible price system reflective of domestic as well as international market forces, and vastly enlarged management autonomy at the plant and industrial combine levels. The changes are to be implemented gradually, with the new system becoming fully operational in the course of the 1966-1970 Five-Year Plan.

New Constitutions and Constitutional Practices

The declaration by the 21st CPSU Congress in 1959 that socialist construction had been completed in the Soviet Union found an early echo in Eastern Europe. Within a year, the Communist Party of Czechoslovakia made a similar statement and formally embodied it in a new constitution. The Czechoslovak Socialist Republic is now officially "marching toward communism."

The 1960 Constitution of Czechoslovakia postulates two basic principles of public order: expansion of the lower levels of political and economic administration to include broader par-

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ticipation by the working population on the one hand, and full control of the national economy by the central government on the other. (In certain respects, the second principle is now undergoing revision). Under this scheme, the determination of competent supervisory responsibility in the sphere of local government became of singular importance. Two high-level agencies were created for that purpose: the Government Commission for National Councils, and the Central Administration for Local Government Affairs. The first is a policy-making and regulatory agency, while the other is a supervisory organ directly responsible for the enforcement of governmental instructions. The latter body is concerned with the performance and personnel questions of the local administrations and control of funds allocation in governmental operations at the provincial and local level. High on the agenda of both agencies appears to be the task of preventing the diversion of available resources to projects of purely local benefit.

While it would be difficult to discover in this constitution a basic departure from the established Soviet pattern, the new Yugoslav Constitution, adopted in April 1963, departs from the Soviet example in its most important aspects. Yugoslavia is not only a federation of "voluntarily united and equal peoples," as the document states, but in fact a federation of parishes which represent the only level on which direct democracy and popular election is practiced. All the higher representative organs up to the Federal Assembly are elected indirectly by one of the representative organs at a lower level. The Federal Assembly has several representative bodies within it—the Federal Chamber, the Economic Chamber, the Education and Culture Chamber, the Social Welfare and Health Chamber and the Organizational-Political Chamber—but of these the Federal Chamber is by far the most important. The President of the Republic is elected by the Federal Assembly for a four year term and may be re-elected for a further consecutive term. A special constitutional provision states that the limitation regarding the tenure of the office of President "shall not apply to Josip Broz-Tito"; Marshal Tito was duly elected President shortly after the Assembly first convened.

The Polish effort to give new meaning to its socialist fundamental law has led to an increase in the role of the Sejm (parliament), which, although debased both by the authoritarian regime before World War II and by the Communist regime of contemporary Poland, still appeals to the public imagination as the one remaining political institution somehow representative of national opinion. In an effort to strengthen the notion that the Polish state is a kind of representative democracy, the regime has sought in a series of measures to reassure the people that in the Sejm their national interest has a sturdy guardian. Although the Sejm assembles for short sessions only, its commissions, which at the present time have reached the impressive number of nineteen, are active in the interim periods, with the effect that the vast majority of the Sejm members continue in office for the full period for which they are elected.

Another feature of the program to reformulate the basic principles of public order in Eastern Europe is the greater inclination to admit officially that Communist parties play the leading role in government and public life. Both the Czechoslovak Constitution of 1960 and the Yugoslav Constitution of 1963 have come out with appropriate statements to this effect. The place of the party in the government establishment and public affairs was also stressed in the Bulgarian Law on Party and Government Control of June 16, 1964, and the Party-Government Resolution of May 22, 1964. In the past, only the Albanian Constitution had openly acknowledged the leading role of its Communist Party.

In Quest of Socialist Legality

A major portion of recent legislative activity in Eastern Europe is designed to stop the abuses of individual rights and liberties which the Stalinist regimes inflicted on the citizenry. Considerable improvement in this respect was achieved by purging the legal systems of the East European states of borrowings from Soviet law. Thus criminal prosecutions for tardiness and absenteeism in industry were suspended, and eventually the punitive legislation itself was repealed. Similarly, the prohibition of marriage with aliens was abolished. Other practices, such as enforcing overtime work without overtime pay, shortchanging workers as to hours of work and labor conditions, and abuses in the distribution of bonuses proved to be more enduring. On the other hand, reforms were introduced in the distribution of social security benefits. Most important of all, however, the restrictions of the vast secret police organizations and of concentration camps relieved the pall of terror which hung over the worker from morning to night.

Reform of criminal law in Eastern Europe was initiated by similar reforms in the Soviet

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Union. The first step undertaken by the East European states was to eliminate from their legislation some of the questionable principles borrowed from the USSR. For instance, the analogy clause,[3] which had been incorporated into the Rumanian, Albanian and Bulgarian criminal codes, was removed. In line with this development came the tendency towards stricter interpretation of the definitions of crime in criminal legislation and less frequent enforcement of the exceptional decrees enacted in the post-World War II period.

Of even greater importance, however, is the trend towards clarification and systematization of the body of criminal law, which in the Stalinist period had been expanded by a mass of special decrees providing for criminal prosecution of new crimes, or imposing harsher penalties for old crimes. This legislation had paid no attention to earlier laws or traditional aims of criminal policy, thus resulting in chaos and unstable judicial practice. In 1959, Albania enacted a new criminal code and a code of criminal procedure. In 1961, a new criminal code was passed in Hungary, while in Poland various attempts at preparing a new criminal code finally resulted in a draft, which in line with the criminal legislation of the other Communist countries restricts the application of the death penalty and provides for shorter terms of deprivation of freedom.

Another improvement in the position of the individual vis-à-vis state authority resulted from the mere fact that the powers of the secret police were circumscribed and its activities confined, in some countries at least, to the protection of state interests against espionage and hostile political action. In theory, criminal prosecution for all criminal transgressions have always been under the control of public prosecutors, who are officers of the courts and in most Eastern European countries have legal training; in practice, however, public prosecutors under the Stalinist regimes exercised no control over the handling of cases by the secret police. To redress this situation, Yugoslavia, in the Code of 1953 re-established full judicial control of preliminary investigations and gave the courts the exclusive right to impose preliminary detention on suspects. Elsewhere in Eastern Europe, after a series of partial reforms of criminal procedure, the public prosecutor was given the right to assume directly the investigation of more complicated cases, and interested persons were afforded the right to appeal decisions of police authorities to him or to the courts.

Since the state is the sole employer and the sole owner of industry, retail establishments, and the means of transport and communication, dealing with the state is a constant feature of daily life of practically everybody in Eastern Europe. In Poland and Hungary, codes of administrative procedure were enacted in order to protect the citizen from the arbitrary action, or inaction, of administrative authorities and to determine the order of appeals and judicial remedies against unjust decisions of government agencies. Also, in Poland, Hungary, and Yugoslavia, press legislation has provided the individual with some means of defending his name against attacks in the press, which in Communist states is regarded as another arm of the government and Communist Party.

In certain respects, however, there is evidence of reversals in the more liberal legislative trends in Eastern Europe. The legal profession in Poland, Rumania and Hungary, for example, is in the process of forcible collectivization. The lawyer in these countries has traditionally been the spokesman for liberal causes. He may now disappear as a significant social factor.

[3] See p. 54.

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YUGOSLAVIA:

Parliamentary Model?

By James C. Lowenstein

Since the break between Tito and Stalin in 1948, there have been many bold departures from Marxist orthodoxy in Yugoslavia, which have resulted in the development of a political and economic system fundamentally different from any other in the Communist world. The regime's first major experiment in developing new institutions took place in 1950, when elective Workers' Councils were established in every factory and given a voice in management unknown before in centrally-planned Communist economies, or indeed in prewar Yugoslavia. The latest of the regime's unique institutions, established by the new constitution of 1963, is the Yugoslav Federal Assembly, a body of considerable complexity and broad powers which may prove to have far-reaching significance not only for Yugoslavia but for the rest of the Communist world.

The Assembly is composed of a general political body called the Federal Chamber (which has within it a separate Chamber of Nationalities), and four bodies known collectively as the Chambers of Work Communities, dealing respectively with economic questions, social welfare and health, education and culture, and organizational-political matters. This parliamentary system was conceived by its founder, Edvard Kardelj—the principal drafter of the new constitution and now the Assembly's President—as "a specific kind of bicameral system," in which the Federal Chamber would be "the general political body, with all the legislative and political competences granted to the Federation," and the other four chambers would operate more or less as "supreme Workers' Councils," supplementing the work of the Federal Chamber within their own areas of competence "but not in political affairs." [1] Thus it is in the Federal Chamber that the real power of the Assembly, and therefore of the government, resides.

The unusual character of the Assembly applies to its functions as well as its structure. According to the constitution, it is responsible not only for legislative decisions but for "political supervision over the work of the political, executive and administrative organs of the Federation" (Art. 14). In addition, its powers include issuing authentic interpretations of federal law; calling referenda; adopting and then supervising the federal budget and the annual federal financial statement; electing and removing the President and Vice-President of the Republic, and the President and Judges of the Constitutional Court, the Supreme Court, and the

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[1] "On the Principles of the Preliminary Draft of The New Constitution of Socialist Yugoslavia," report of Sept. 20, 1962, printed in *The New Yugoslav Law*, July-December 1962.

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Supreme Economic Court; appointing and removing the heads of the Federal Secretariats (as the administrative departments are called) and the Deputy Commander-in-Chief of the armed forces (the President of the Republic is the Commander-in-Chief); deciding on any alteration of the country's boundaries; declaring war; ratifying certain international agreements; and amending the constitution.

While the constitution does not define the Assembly's overall power of "political supervision," it does list certain functions through which this power is to be exercised. Thus, it is the Assembly's responsibility to "decide on political matters and determine the foundations of internal and foreign policy," to determine the duties of federal authorities and organizations responsible for enforcing the laws, to debate the reports of federal courts and the Federal Public Prosecutor concerning the enforcement of federal law or the general problems of the judiciary, and to "enact declarations and resolutions and make recommendations to state organs and autonomous organizations giving its opinion on matters of general concern."

The President of the Republic, Marshal Tito, is nominally subordinate to the Assembly. He is elected by it and (under Art. 219) is "accountable" to it. While he may nominate certain top officials, the Assembly must confirm his designees. He has no veto power *vis-à-vis* acts of the Assembly; and while he may stay certain actions of the Federal Executive Council, even in this case he must place "the dispute" before the Federal Chamber for decision. He is required to inform the Assembly on all matters of state policy, and specifically on problems of internal and foreign policy. Finally, he has no authority to propose a bill but only the right to recommend that the Assembly discuss a certain subject or consider passing a decision.

Similarly, the Federal Executive Council, which was formerly the most important organ of governmental authority, is under the new constitution "an organ of the Federal Assembly" and is "responsible for its work to the Federal Assembly." The President and members of the Council are elected by the Federal Chamber from among the members of the Assembly. The Council has no appointive power but only a nominating role. It can only propose internal and foreign policy to the Assembly. It can prepare draft laws, the draft social plan and a proposed budget, but final action must be taken by the Assembly. The Assembly may rescind or cancel any Council decision or regulation "that is at variance with the constitution or law." Conversely, if the Assembly passes a law to which the Council is opposed, the only action the Council may take is to submit its resignation to the Assembly.

The federal administrative departments are even farther down the chain of command. Under the constitution they are charged with enforcing federal laws and regulations in accordance with "the policy determined by the Federal Assembly and the general instructions of the Federal Executive Council." The heads of federal administrative departments—the Federal State Secretaries and Federal Secretaries—are nominated by the President or the Federal Executive Council but appointed or dismissed by the Assembly.

It is clear, then, that the new Assembly is constitutionally the supreme governmental body in Yugoslavia, with full responsibility for policy as well as for legislation. How does this parliamentary amalgam operate?

All five Assembly chambers may meet in plenary session, and must do so to elect the President and Vice-President of the Republic and the President and Vice-Presidents of the Assembly. All five chambers must also meet to extend the Assembly's term or "to debate questions of general political significance." Plenary sessions are rare, however; there were less than half a dozen in the first year of the Assembly's existence.

Thus, most of the Assembly's work is done by the Federal Chamber acting alone or in concert with one of the four Chambers of Work Communities.

Matters under the exclusive jurisdiction of the Federal Chamber include the election or recall of the President, members of the Federal Executive Council, and certain federal court officials, as well as the appointment or recall of the heads of federal administrative departments and the Deputy Commander-in-Chief of the armed forces. The Federal Chamber meets alone to debate or legislate on foreign policy, national defense, state security or "general domestic policy." It also ratifies international agreements within the Assembly's general jurisdiction. On all other matters requiring legislation, it meets with one or more of the other chambers.

Each of the four Chambers of Work Communities may also meet independently to debate or study various matters that concern "working organizations" (Workers' Councils and management boards) in their fields of activity. These chambers can make recommendations on their own to a working organization but they cannot legislate alone—that is, without concurrent action on the part of the Federal Chamber.

The Chamber of Nationalities is required to meet as a separate body only when the Federal Chamber has on its agenda a proposal to amend the constitu-

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tion. It may meet when the Federal Chamber is considering a draft law which might affect "the equality of the peoples of the Republic"; at such meetings, however, it has no right to vote but may only propose that the draft law in question be amended or rejected.

Obviously, the Yugoslav leadership would not have created this constitutionally powerful parliamentary instrument without at the same time insuring that it would remain under party control. The key to such control lies in the system of electing members of the Assembly. Altogether, the membership totals 670 deputies. In each of the four Chambers of Work Communities sit 120 members elected by the Chambers of Work Communities in municipal assemblies (there are 577 assemblies at this lowest level of local administration, grouped into 120 election districts).

The election of Federal Chamber deputies is a more complicated matter. This Chamber has 190 members, 70 of whom are concurrently members of the Chamber of Nationalities and are elected by the assemblies of Yugoslavia's six republics and two autonomous provinces. The remaining 120 members are elected by the Municipal Chambers of Municipal Assemblies (the general political chambers of the local legislatures). Technically, the election of these 120 deputies is only provisional, pending confirmation by popular referendum. Yugoslav authorities refer to the process of confirmation as "popular elections," obviously hoping to give Yugoslav citizens a feeling of participation in the selection of the national parliament. However, the only option given the voters is to approve or not approve the Municipal Chambers' choice. It is interesting to note that in the first election under the new constitution, held in the spring of 1963, every Federal Chamber deputy elected by a Municipal Chamber was confirmed in the referendum by from slightly under 95 to over 98 percent of the voters.

By contrast, deputies to the Municipal Assemblies are directly elected, although the process by which they are nominated again denies any real choice to the voters. In the 1963 elections, nominations issued from voters' meetings in which the League of Communists of Yugoslavia (as the Communist Party is called), working through the mass front organization, the Socialist Alliance of the Working People of Yugoslavia, played a decisive role in selecting the candidates. Only about 55,000 nominees were selected for the approximately 43,000 Municipal Assembly seats. Thus in most cases there were not even two candidates from which voters could choose.

In sum, then, the present body of federal deputies was elected indirectly by directly-elected municipal deputies, who were nominated in voters' meetings tightly controlled by the party, and who often ran unopposed. Through this system the one-million member League of Communists assured its control of an Assembly representing almost 20 million people.

The party's dominant role can be seen from an examination of the political backgrounds of Federal Chamber members. According to biographic information published in the 1964 Yugoslav World Almanac, 184 of the 190 members of the Federal Chamber have held office at some time in a party organization, and the other six are almost certainly party members (before becoming deputies, two were Slovenian Assembly deputies and the other four respectively a trade union official, an army general, a student leader and a university dean—all positions in which it would be most unusual to find non-party people). Furthermore, the Chamber includes 10 of the 14 members of the Executive Committee of the Central Committee of the League of Communists (the new name of the party Politburo), 48 of the 130 members of the Central Committee (14 other CC members are deputies in other chambers), and 56 members of the Central Committees of the six republican party organizations (*i.e.*, one-half to two-thirds of the total membership in each republican CC).[2] Finally, the Assembly President, Edvard Kardelj, is one of the three top leaders in the party.

A new election to the Federal Assembly is scheduled to take place in the spring of 1965, and under the terms of the constitution, half of the deputies in each chamber will be new figures. It will be interesting to see what shifts take place in the make-up of the membership.

What is the significance of the new Yugoslav Assembly? Those who view it in a favorable light see it as an evolutionary step toward further democratization, paving the way for the expression of more liberal political tendencies in Yugoslav society, providing a forum for more discussion and debate on national policies, and giving Yugoslav citizens a greater voice in the selection of their representatives. To others more critical, the new Assembly appears to represent primarily an attempt to legitimize the regime, to give the Yugoslav people the illusion but not the reality of free elections, and to perpetuate party control in a more subtle and palatable fashion.

[2] This analysis was made before the Eighth Party Congress in November 1964, which enlarged the party's Central Committee and Executive Committee and elected new members to both bodies.

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Like so much else in a country noted for contrasts and contradictions, the new Assembly may be all of these things. Constitutionally, however, the new parliamentary system indisputably provides a framework for introducing a measure of democracy and curtailing arbitrary political intervention and control. The extent to which this framework will be utilized remains to be seen.

It is also too early to gauge the effect that Yugoslavia's experiment will have on other Communist countries. The Soviet Union is in the process of drafting a new constitution which, according to reports, may well provide for a similarly increased emphasis on the role of parliamentary institutions; this possibility has often been mentioned in the public statements of Soviet officials and in the Soviet press. No doubt Moscow and others in the Communist world are watching to see what effect a taste of parliamentary rule will have on the popular appetite in Yugoslavia.

TO OUR READERS—

Due to its unusual length, this issue of *Problems of Communism* has been considerably delayed. The editors hope to be back on schedule with the May-June issue. Among articles soon to appear:

Soviet Agriculture: The Lean Years, *by Nancy Nimitz*
Agriculture and Literature in the USSR, *by Ronald Hingley*
The Vocabulary of Indonesian Communism, *by J. M. van der Kroef*
Communism in Iran, *by Sepehr Zabih*
Khrushchev's Fall and Aftermath—A Discussion

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Soviet Courts Observed

GEORGE FEIFER: *Justice in Moscow.*
New York, Simon & Schuster, 1964.

Reviewed by Frederick S. Wyle

THIS BOOK, written by a young American exchange student, provides a lively account of various types of court trials and legal proceedings in the Soviet Union, including generous excerpts of apparently verbatim testimony and comments by participants. These excerpts furnish the student of the Soviet legal system with useful raw material and in this reviewer's opinion, comprise the most valuable part of the book.

Unfortunately, Mr. Feifer does not stick to reportage. He includes his own lengthy commentary on the Soviet legal structure, on the comparative worth of Soviet and American legal institutions, on "justice," and on all manner of subjects. Aside from these often naïve discourses, there are few surprises in the information he furnishes. The staples of other research on Soviet legal institutions are more or less confirmed: the wide variety and informality of Soviet "legal" institutions and courts; the undeveloped state of the law, technically, intellectually, and professionally speaking; the relatively unimportant place of the law and legal institutions in Soviet society; the Soviet indifference to precise proof of particular charges of crime; the conversion of the court trial, for reasons compounding Russian cultural and Soviet ideological factors, into a probe of the defendant's entire life, motivations and general attitudes; the role of the Soviet court "assessors"—a supposed substitute for the jury—as mere court "furniture," and so on.

What is notable about Mr. Feifer's commentary is the extraordinary lengths to which he goes to avoid the shadow of any suspicion that he may be prejudiced against the Soviet legal system by his Western background, or by his native common sense. The results of these efforts do not, unfortunately, reflect favorably on his perspicacity or on his claim to "objectivity."

MR. FEIFER MIGHT HAVE made a rational case for his views. For example, he might have argued as follows: One cannot expect the Russian system of law to equal the Western systems. The "rule of law" as it is understood, say, in the United States, is a product of our particular happy history of Anglo-Saxon juridical inheritance, a stable society in which

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Mr. Wyle is the author of "The Soviet Lawyer: An Occupational Profile" (Soviet Society—A Book of Readings, *edited by H. Inkeles and K. Geiger, New York, Houghton Mifflin, 1961). As a former practicing attorney, he interviewed a number of Soviet lawyers in connection with the Harvard Project on the Soviet Social System (1950-51).*

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the law is used as the ultimate means to settle (through Constitutional interpretation) what would otherwise become intolerably divisive political issues, and the slow and arduous struggle for protection of the individual against the wielders of power of all sorts—the struggle, that is, for civil liberties. In terms of sophistication, intellectual accomplishment, and stress on protection of individual rights, the American legal system (or the British, or the French)—despite undeniable failings—has clearly progressed so far beyond the Russian that a comparison is quite senseless, since any comparison presumes common political purposes and goals, and these are lacking.

It is nevertheless true, the argument might have continued, that the Russians are beginning to move down some paths that others have trod before them in the evolution of the law. Partly this is because any modern industrial system requires stability, predictability, uniformity, and the settlement of conflicts of interest by reference to some sort of known rules and system of predictable adjudication.

Partly, and perhaps most importantly, it is because there are basic notions of fairness which human beings in all modern societies seem to share, and the Russians are no exception. (Indeed, the second half of the 19th century saw a rapid development of prerevolutionary Russian law in the Western tradition.) These trends in Soviet law are of course only incipient and have certain limitations inherent in the Soviet system. Any substantial advances towards the law as it is understood in the West must inevitably wait on further political and social evolution in the Soviet Union.

MR. FEIFER DOES NOT, however, make such a case, or anything remotely like it. He is determined to prove instead that since the Russians are basically just as decent as anyone else, their legal system must be just as good. He attempts to establish this patent absurdity by downgrading the American legal system so that it comes out no better than the Soviet. The conflict between Mr. Feifer's common sense and his emotional needs is evident throughout the book. One wishes he could have resolved it in another way than by making foolish statements about American law. For example, conceding the disadvantage of the Soviet judge's participation in the trial more or less as a prosecutor, Mr. Feifer counterattacks against American law as follows:

Of course, this [Soviet] approach to the trial places great reliance on the judge. And I knew there would be abuses. But isn't the abuse as great in America, where reliance rests on ambitious prosecutors, greedy lawyers and bigoted or intimidatable juries? Habeas corpus, warrants, and strict rules of evidence fail to protect too many Americans who do not understand these principles or are too poor to engage an able attorney or to purchase their way out. Both systems, of course, can work poorly or well in practice, but it seemed to me that in the petty cases advantage lay with the Soviet. I had watched American courts at work. I had seen the influence of the dollar, overheard the deals, sensed the dishonesty, and I was disappointed by the callousness and crudeness of the lower courts. Perhaps there was chance of finding something better in Moscow. (*Page 18*)

This grossly distorted picture of the average American judge or court cannot be taken as a serious effort to report the existing state of affairs in the United States. Indeed, it is more appropriate to a Dickensian caricature than to 20th-century American reality. Mr. Feifer does not disclose whether he has ever even been in any of the countless small-claims courts in the United States in which no lawyer is needed, in which procedure is entirely informal, and in which, in fact, the vast majority of small claims are fairly and immediately adjudicated or settled. Nor does he mention the legal aid societies available in almost every population center, small or large, which furnish free legal services to those who cannot afford to pay for them, or the fact that in criminal cases the federal courts as a matter of constitutional requirement and the state courts for a variety of reasons furnish free legal counsel, often of excellent quality, to defendants who cannot affort to pay for legal counsel. All of these institutions undoubtedly need improvement and the picture is not one of perfection, but to distort them and then equate them with Soviet institutions is to engage in a sleight-of-hand unworthy of a serious scholar or observer.

This penchant for invalid comparisons recurs throughout the book. Thus, without any supporting evidence whatever, Mr. Feifer informs us:

Every statistic confirms that in American courts it's "the rich what gets the mercy and the poor what gets the blame." But it is no longer the same the whole world over. In the People's Courts, money talks softly, when at all. (*Page 79*)

On the appointment of judges by the party in the Soviet Union, he reveals the confusion in his mind regarding moral ideas and procedural medians. He declares:

The idea of appointed judges does not seem sinister to me; I have too often seen the corruption of elected judges in American settings. (*Page 83*)

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No one has suggested that the appointment of judges in itself is "sinister." The notion that there is something inherently reprehensible about "appointment" of Soviet judges, which must therefore at once be counterbalanced by an attack on the professional integrity of American judges (who are actually selected in a variety of ways—including appointment and who operate in an entirely different context of judicial independence) is evidence of the false dilemmas in the author's mind. One doesn't have to hate the Russians to think that their courts and judges are very different and much less effective social forces and mechanisms than Western ones.

WHEN MR. FEIFER stops trying to compare incomparables, his prose becomes more credible. In one interesting passage, he gives his impression of the sentiments of a number of Soviet lawyers on their role in society:

They have seen too much sloppiness and injustice, and they do not think it all accidental. Some have given up reading legal literature, because they feel that theory and scholarly analysis are irrelevant to their practical work so long as the actual, unwritten regles [sic] of the courts remain governed by other considerations.

The knowledge that they play second fiddle in the courtroom bothers these men in their serious moments. . . .They complain that the court does not listen to their points of law, not even to their closing speeches; that the judge, who is usually less literate than they, assumes a disdainful expression while they speak and sometimes even laughs. . . .Even the law students on my floor in the dormitory thought of the trial as something of a formality and, consequently, of the lawyer's role as superfluous. . . .

. . . .Most of the lawyers with whom I talked confidentially muttered that their own influence and sphere of activity is too limited, too restricted. . . . that the decision depends less upon how they are able to work with the facts than upon. . . bigger, political forces. . . . (Pp. 245-46)

These observations seem so obviously true from Mr. Feifer's own description of actual trials that one should not have thought them objectionable. However, Mr. Feifer evidently felt the need for a prophylactic introductory phrase to the above quote: "The best of the lawyers are cynical. (*In what country are they not?*)" (Page 245, emphasis supplied). For good measure, lawyers (it is clear from the context that this means all lawyers, not just Soviet ones . . .) are also variously described as "smooth-looking," "muttering" (when they criticize the Soviet legal system), and given to "practiced, self-conscious precision . . . esoteric procedural niceties and devotion to form," etc.

— Обещаю жить в мире с моей соседкой. Слова больше не скажу об этой дряни!

Рисунок Е. ЩЕГЛОВА

"I promise to live in peace with my neighbor. I won't say another word about that bitch!"

—From Krokodil (Moscow), Nov. 10, 1964.

UNFORTUNATELY FOR HIS understanding of liberty and justice, Mr. Feifer's own views on law seem to have been much influenced by his determination to be "fair" to the Soviet legal system. He says, for instance, that he became quite accustomed to taking a guilty verdict for granted:

It was rare . . . that I felt a blameless *man was being convicted, however sure I was that he was innocent of the particular crime as it was described in the legal qualification of his acts, or that he did not deserve the punishment awarded. All of the sad faces had done* something *wrong,* something *which justified the state's intervention and punitive action.* [*Author's stress.*]

This view of criminal justice—that since we are all sin-

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ners we should all be punished, never mind for what—is not impossible to acquire, Mr. Feifer assures us, given some effort and time:

It usually takes time for those reared in the Anglo-Saxon legal tradition to overcome the notion that a thorough pretrial investigation is sinister in itself. Properly executed it may be humane. It was to avoid the evils of the old *inquisition, the methods of an unscrupulous Crown, that the English safeguards, so precious to us now, were slowly pieced together. But these strict rules isolating the accused, excluding this and that, making simple stories intricate, may be out of date in an age of civilized civil servants, welfare governments and enlightened citizens. An impartial and efficient investigation may serve everyone's interests—except, to be sure, the criminal's* (*Page 90—Stress in original*).

Would Mr. Feifer apply his views on a "thorough" pretrial investigation without the bothersome intricacies of civil liberties to court procedures in his own country? As to "an age of civilized civil servants," and so on, is Mr. Feifer really serious?

What is wrong with uncontrolled investigation by the police is that at times, and often under circumstances that seem to them justified, they force confessions out of people. They have done it for many hundreds of years, all over the world. Often the confessions are false. It is easier to get a confession from a frightened prisoner than to get the facts from an arduous investigation elsewhere. So that, in addition to the fact that such investigations are inhumane, they are often very poor means to learn the truth.

MR. FEIFER, however, is determined to see the new Soviet inquisition in an altogether different light from the old English one. For example as evidence that the Soviet pretrial interrogation of *suspects* is really quite humane, he describes a police interview of the *victim* of a theft! He says:

. . .the detective was brusque but not unkind; he kept telling Svetlana to relax and have patience. . . .The detective, a provincial bureaucratic type did not seem like a man given to roughing up suspects, and in this seemingly open-and-shut case he observed the procedural regulations scrupulously. For the life of me, I could not find anything to criticize in his manner.

Surely no one has accused the Russian police of beating up the victims of petty criminals when they file complaints with police officers. The example is irrelevant. Indeed, Mr. Feifer recognizes this. He says that the Soviet detective ". . . was questioning a victim, not a suspect, and the matter was very minor. Still, I offer it for what it is worth."

In the same vein are Mr. Feifer's passing comments on sexual life in Soviet Russia. He admires the Russians' direct approach to sex: "Muscovites are so strongly heterosexual—so little titillating talk, so much real activity" (p. 207). He is shocked to find homosexuality: "Russians seemed too healthy for that" (p. 208). In several accounts of rape cases Mr. Feifer's descriptive style soars beyond the scholarly tone he seeks to achieve:

The charge was rape. I shall not bother with the details, spicy as they were in this case (the more so because the defendant was a dark, bodybuilding type who would have been primitively handsome had he hair on his head, and the girl was very pretty—fair, slightly plump, and fresh, as if she had just left the farm.

And so on.

Mr. Feifer summarizes his view of Soviet law in the following peroration:

And it is true that court procedure is not the only measure of the law; in Soviet society it is perhaps not the best measure. For the real work of the Soviet court eludes the naked eye. Its product is mankind, not individual men. Not the case at hand, not the fate of Ivanovich or Petrov, not even Dispensing Justice is its duty, but waging the Great Ultimate Campaign for a new world, free of evil and unhappiness. (*Page 333*)

It may be thought that these appalling phrases surely could not represent Mr. Feifer's own view. It may be thought that Mr. Feifer only adopted a sort of megaphone role for the official Soviet point of view, the better and more fairly to permit "Western ears," as he refers to them, to hear some other side of an undefined story. Perhaps, but one doubts it. Indeed, one doubts that Mr. Feifer's future literary and scholarly reputation can survive this disappointing attempt to cope with the intricacies of Soviet justice.

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NOTES & VIEWS

When Comrades Sit in Judgment

By Abraham Brumberg

I had long cherished a desire to see a Soviet comrades' court in action, and so it was with considerable excitement that I approached the narrow, dark entrance to the *krasnyi ugolok* (red corner—Soviet equivalent of an American "community center") of a large Moscow apartment project where a session of the local court was about to begin. I had learned about it quite by accident, having stumbled upon a small notice pinned on one of Moscow's ubiquitous bulletin boards the day before, and now, dressed in a blue English raincoat which after weeks in Moscow had come to resemble the local GUM product, I timidly made my way inside. After walking through a dimly lit hallway, I entered a longish, narrow room with a small podium at the far end. The podium was flanked on both sides by portraits of Marx and Lenin (each with an appropriate slogan) and boasted a rectangular table plus a few chairs. In front of the podium were hard wooden chairs occupied by about two dozen people, almost all of them elderly and—even by Moscow's standards—shabbily dressed.

A few minutes after I seated myself in one of the back rows, the court, in the persons of the chairman—a small, dark-haired man—two other men, and a rather plump, middle-aged woman secretary, entered the room, and the chairman announced that unless anyone in the audience had any objection to the particular *sostav* (composition) of the court (which changes from trial to trial), the session would begin.

The first suit was brought by a tenant whose apartment had been flooded from the apartment on the floor above. The cause was a hot-water faucet, which through oversight had been left open after the entire apartment building had been deprived of hot water for over two weeks. The defendants were a middle-aged mechanic at the Moscow metro (subway), earning a salary of 120 rubles a month, and an infirm pensioner, whose monthly check came to 39 rubles and 25 kopeks. At stake was the sum of 34 rubles, the cost of the damage caused by the men's negligence. The sum was not large, of course; yet, for the pensioner at least, it obviously represented a staggering amount. This much the ensuing debate between the chairman (quiet, paternal), the plaintiff (self-confident, short-tempered), and the two defendants (obeisant and querulous in turn) made clear. Besides, demanded the metro mechanic, why hadn't the ZHEK (apartment administration) fixed the pipes for two weeks? And what about the damage caused to his and his friend's apartment? The exchange became more lively, with the representative of the apartment administration, a rather handsome and well-dressed man, turning to the defendants and warning them that if they didn't pay up, *they* would be told to hire a carpenter on their own, and he would surely charge more than 50 rubles—and

Mr. Brumberg, Editor of Problems of Communism, *last visited the Soviet Union in 1963.*

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how would they like *that*? They wouldn't, and so the discussion turned to the question of whether the 34 rubles should be paid in one lump sum or in installments, with the defendants, of course, pleading for the latter. After a few minutes of rather inconsequential wrangling, the chairman announced that the court would adjourn for deliberation, and that another case be heard in the meantime.

Well, I thought to myself, this was rather interesting, but it lacked the dramatic flavor which I had anticipated. The proceedings that started a few minutes later, however—with a new court (and the same secretary) upon the podium—were to bear out my expectations.

A thin, bedraggled man with a dirty patch over his left eye walked up to the front of the room and began reading off a list of names. "Simion Vassilevich Titkin?" Silence. Then a voice from the audience: "He's not here!" The man went on: "Timofiei Alexandrovich Razumnyi?" Again silence, and again a voice from the audience: "Not here!" At this point the chairman man raised his eyes and with a slightly puzzled expression on his face inquired as to Razumnyi's whereabouts. "He couldn't make it," came another voice from the audience. "He's sick." A short woman, bent with age, and with the inevitable kerchief over her head, rose from one of the back rows and approached the podium.

"Comrade Chairman," she began querulously, "what do we need all this fuss and bother for?" Couldn't the whole matter be settled simply, as among friends? Besides, she went on, her son (the reference was to Timofiei Razumnyi) was innocent. He hadn't done a *thing*.

"But please, citizeness," said the chairman patiently and with good humor, "your son is not accused of anything. He was asked to come here as a witness."

"I don't know—all this business," the woman continued, slowly raising her voice. "He isn't guilty, that's all. He hasn't done a thing!"

"But citizeness," the chairman went on with what I thought was a remarkable display of endurance. "Don't you understand what I am telling you? No one has said that your son has *done* anything; he's merely to testify here as a witness—understand, witness—W-I-T-N-E-S-S."

But the citizeness would have none of it. In fact, she didn't think that Simion Vassilevich should be brought to trial, either. "He is a good lad—why punish him?" He ought to be [*this to the audience*] supported!"

The audience found this vastly amusing, as did the chairman. "Well, perhaps so," he said at last. "We'll see next time. And perhaps—we shall have to expel him from Moscow . . ." [1]

What with the defendant and one of the witnesses missing, the court adjourned till the following evening, first allowing a member of the previous *sostav* to announce the finding in the first case: 34 rubles to be divided in half between the two defendants and to be paid in three monthly installments. The two men sighed with relief, the audience was visibly pleased, and everybody made for the exit. I left, too, eagerly awaiting the next chapter of the case of Simion Vassilevich Titkin.

The following evening, the courtroom was filled with people, among them the defendant Titkin, a young man of 26, blond, with an open face and a decidedly uneasy mien. According to the indictment read by the chairman, Titkin had not been working at his factory for almost seven months, coming home every night in a drunken stupor, frequently beating up his wife, and forcing her to hand over her earnings to quench his incessant alcoholic thirst. A general meeting of the workers at his factory had unanimously accused him of parasitic behavior and demanded his exile from Moscow. At home things had come to such a pass that Titkin's wife, fearful of her husband's violent outbursts, had taken to staying away from their apartment, sending their three-year-old child to her mother-in-law for safekeeping.

The chairman asked Titkin to rise. "Well, what about it?"

With a slightly bowed head, and speaking in half-finished sentences, Titkin began to tell *his* side of the story. Did he occasionally come home drunk? Yes—but *only* occasionally. (Murmurs in the audience). But he *never* used his wife's money for that purpose. ("Then where *did* you get it?" came a question from the floor. The chairman did not react.) Certainly, he missed work—but after all, he had been sick off and on for more than two months. ("Right!" came another voice.) As for intimidating his wife, why, let the chairman ask her himself—she's sitting right beside him.

The chairman turned to Titkin's wife—a bashful-looking girl carrying a small child in her arms. Before she could say a word, however, another woman rose from her seat and began regaling the court with *her* observations of the Titkin household. Yes, there have been fights between husband and wife, but then—what's so unusual about that? Everybody gets into an occasional brawl with his or her spouse. (Murmur of approbation in the audience.) The chairman listened to her and then again turned his attention to Titkin's wife. From her recital, I gathered that she bore her husband no ill will. To be sure, there had been fights, he did come home once or twice and beat her up, but. . .

"Well, then, what do *you* think we ought to do with your hus-

[1] This would be strictly illegal, inasmuch as the comrades' court is empowered only to *recommend* exile (or other forms of criminal punishment) to a regular people's court, which may or may not approve it. But the chairman seemed to be oblivious to this legal nicety.

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band?" asked the chairman. And it seemed to me, just then, as if these words suddenly provided the key to the extraordinary nature of the legal proceedings that were going on around me. For what was the specific charge against Titkin? "Parasitism"? "Appearance in an intoxicated state in public places"? "Absence from work without valid reason"? "Unworthy behavior toward women"? "High-handed acts," "abusive language," or perhaps some "other antisocial acts not entailing criminal liability"? (All these and many other transgressions are listed in the USSR "Statute on Comrades Courts.") What is more, it wasn't at all clear who precisely was pressing any of these vague charges. Titkin's fellow-workers? If so, why not either hand over his case to the regular courts, as the statute prescribes, or perhaps try him again before the factory's court? His fellow tenants? From the behavior of those present, I gathered that Titkin's neighbors were not particularly scandalized by his behavior. Well, then, what about his wife? It turned out that she, too, was not eager to press charges. He should be given another chance, she haltingly told the chairman—who knows, perhaps he would stop drinking and become a more responsible husband, father, and citizen. After all, this was his first transgression. At this point Timofiei's warmhearted mother, who the evening before had provided us with such a spirited example of Chekhovian humor, quickly sprang to her feet: "She is right, Comrade Chairman!" she exclaimed. *"Cheloveka nado no put povesti* (one ought to help straighten a man out) and not punish him." "Right, right!" came a chorus from the audience. "Give him a chance." "He is an orphan!" "Just give him a warning!"

"Well," said the chairman, looking impassively at the audience, "Titkin was accused by his comrades of unsocial behavior. He does not work. He drinks. How, comrades, can we possibly enter communism with such people among us?" (Pause. Silence.) "The court will consider all that has been said here and will announce the verdict later. Now for the next case."

The chairs were reoccupied (for by that time the excitement had caught almost all of Titkin's assembled neighbors), and the next defendant was asked to rise. This time there could be no mistake about the nature of the man. Fifty years old, slightly stooped, with an expression at once cunning and vacuous, he twisted and turned as the indictment was being read. The plaintiff was a middle-aged widow who had wanted to rent a room at the defendant's apartment while he was serving a two-year jail term (only his wife was living there at the time.) The room, it seems, was perfectly satisfactory, and she had moved in. One fine day, however (here the story began to be interrupted with sniffles and tears, which slowly infected other women in the audience), there was a knock at the door, and there was the defendant, bowing and scraping and begging to be admitted. Naturally she let him in, but no sooner did he make himself at home than he took out a bottle and started to drink and use foul language. Frightened, she ran into her room and locked the door. (The wife, obviously, was not around—in fact, she didn't seem to be around *anywhere*. . . .) The defendant began knocking at the woman's door, becoming more abusive and finally committing the ultimate indignity of urinating right outside her room. Having related this incident, the woman, no longer able to contain herself, burst into tears and sat down.

The audience was obviously exercised by the story, and even more so by the behavior of the defendant, who, questioned in turn by the chairman and one of the other members of the *sostav,* denied the allegations lock, stock and barrel. "Didn't you drink and behave like a hooligan?" *"Khospodi pomilui* (God forbid)! "No, never!" "You're lying," came a voice from the audience. "Well, perhaps I took a drink or two," the defendant admitted indignantly, "but I certainly did not insult anyone." Besides, he informed the chairman, the plaintiff was clearly untrustworthy. "What a reputation she has! Goes around smoking one cigarette after another all day long—word of honor! Ask anyone and you'll hear the same thing—nobody can stand her, nobody wants to live with her." "Lies, all lies," came a chorus. Several people stood up and began to talk in unison, gesticulating, shouting, trying to make themselves heard over the voices of their neighbors. The chairman pounded on the table and asked for quiet. And suddenly at this point my second visit to the comrades' court took an entirely unexpected turn.

As I sat there totally absorbed by what was going on and manfully trying to jot down a few notes, the man with the patch over his eye appeared, glared at me, and demanded to know who I was and what I was doing there. "I am an American," I said, "a journalist, and I am interested in comrades' courts." "Come with me," said the man—and, mindless of my neighbors who had obviously been eyeing my suspicious reportorial activities for quite some time, he led me out of the court room.

I was ushered into a small room where I found the members of the first *sostav* and a man in his late thirties, whose neat, well-groomed appearance clearly distinguished him from the others. A minute later the members of the second court, along with the chairman and the woman secretary (whose name, as I soon found out, was Citizeness Gurvich), entered the room and seated themselves behind a large desk. I was now faced by about ten people, all of them—with the possible exception of Madam Gurvich—staring at me with what I felt was a distinct lack of friendliness,

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albeit not without curiosity. It was clear that I was in for one of those interrogations to which inquisitive foreign tourists in Russia are so frequently subjected. And it was clear, too, that it was the well-groomed man who was to be in charge of it.

The questions followed one another in rapid succession: Who are you? What is your business here? Who gave you permission to come to our court? I replied that I was an American journalist, that I had long been interested in attending a comrades' court, and that I was not aware of the need to obtain any permission to do so. Then, in turn, I asked my questioner who *he* was. Startled by this unexpected reversal of roles, he replied quickly that he was a member of the comrades' court, and then, realizing perhaps that the reply was less than convincing, he added: "That's none of your business, anyway. So you are an American journalist, eh?" Then, with growing hostility: "Whatever gave you the idea that you can just enter a court without permission? Don't you Americans know anything about etiquette?" I said, again, that I was not aware of any Soviet law that requires a visitor to obtain permission to visit a court (there is none). Of course, I added, if there *were* such a law, then I was obviously in the wrong and was ready to admit my mistake. At this point the chairman interrupted, saying that the regular "people's courts" were one thing—everyone was welcome there—and "comrades' courts" another. "Perhaps so," I answered, "but all I can say is that I have not been aware of any restrictions."

My replies were obviously not to the liking of the well-dressed "member of the comrades' court," for he resumed questioning me with increasing vehemence. Why hadn't I at least asked the chairman for permission? ("As I said—I didn't know it was necessary.") Didn't I know that the courts were not open to everyone? ("But the chairman just told me differently.") Didn't I realize that what was allowed to Soviet citizens was not necessarily allowed to foreigners? ("No, that's news to me.") Don't Americans have any rules of etiquette at all? What would happen if a Soviet citizen were to enter an American court, just like that, without asking for permission? ("I assure you, no one would dream of bothering him.") Why was I interested in comrades' courts? Why only in the seamy side of Soviet life? ("I am not"—this to the obvious satisfaction of some of the others—"I have seen your university, your Pioneer Palace, the new construction in Volgograd. . . .")

The atmosphere was getting decidedly uncongenial, the questioning more intense. I was told to produce my documents, and when I replied that I had left my passport at the hotel, my interlocutor announced that we would have to go to the nearest militia station. I replied that I would insist on calling my embassy first. My interlocutor relented (it was rather clear that he had no case), but perhaps out of sheer frustration he clenched his fist in front of my face and exclaimed: "You know how we treat people who try to break into our Soviet garden? With our fists—that's how!" I replied that I was unaware of breaking into any gardens whatever. "You have behaved like a scoundrel (*po khamski*)!" he shouted, livid with rage. I said I was surprised to hear him use such terms—was *this* in keeping with *Soviet* etiquette? I took out a cigarette and struck a match. My questioner was beside himself: "Is this how you Americans behave?" Don't you first ask the lady whether she minds your smoking?" I turned to Citizeness Gurvich with elaborate courtesy: "May I?"—thus unwittingly succeeding in embarrassing her and her mild-looking chairman, who had been puffing incessantly ever since I had entered the room.

The wrangling went on for another twenty minutes or so, the questions repeating themselves with monotonous regularity (at one point I grew quite exasperated and inquired whether they thought I had come to the courtroom equipped with a capitalist bomb). But it was clear that the charges against me were even more tenuous than those against Simion Vassilevich Titkin, and so, as suddenly as it had begun, the interrogation ceased and I was told that I was free to go. "In that case," I said, "I should like to have permission to go back to the courtroom." My interlocutor was visibly shaken. "No, you can't go back," he said testily. Why not, I demanded—they had heard my story and satisfied themselves as to my intentions, then why was I not permitted to go back? "It is not for me to decide," he said, with cold fury, "it's up to the *kollektiv*." I turned around to the *kollektiv*, as I had a few minutes ago to Citizeness Gurvich, and repeated my request. The *kollektiv* in turn looked at the chairman, who, after a pause, said rather weakly: "There's no point in going back—it's all over; only the verdict is to be announced." "Fine," I said, "I'd like to hear the verdict." "All right," said the chairman resignedly, "go ahead."

I returned to the courtroom, much to the amazement of the assembled audience, again seating myself in one of the back rows. About half an hour later the court reappeared, and the chairman read the verdict. Citizen Titkin was given a warning—if he didn't mend his ways within a month, the comrades' court would refer his case to a people's court with a recommendation that he be exiled from Moscow. (A specialist on Soviet law told me later that my presence in the courtroom may have had something to do with the mildness of the sentence.) The other defendant also got off fairly easily; he was fined ten rubles for vandalism, given a reprimand, and warned sternly by the chairman that if he, too, didn't mend his ways, he would most definitely be

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exiled from Moscow. "Remember," said the chairman, wagging his finger, "if you should ever find yourself here again, we won't treat you with kid gloves, you understand?" "Yes, Comrade Chairman," exclaimed the man, bowing and clicking his heels grotesquely, "I understand!" "You promise not to drink any more?" continued the chairman. "I promise—not a drop!" "You promise not to create any more scandals?" "Word of honor, Comrade Chairman, may I be struck by lightning if I ever give you trouble again!" It was pure Chekhov once more. "All right, then—you may go," said the chairman. "The court is adjourned."

The tenants slowly filed out of the room. Gathering up my coat and notebook, I followed the others. Before I went out into the courtyard, I stopped to say good-bye to the chairman and Citizeness Gurvich, who were standing nearby and looking at me. "Well, you see," said the chairman pleasantly, "had you come to me and asked for permission, I would have gladly given it to you." I had my doubts, but I didn't voice them. Citizeness Gurvich was the next to speak. "How did you like our court?" she asked with a smile. "Extremely interesting," I replied, in all sincerity, "—*extremely*." We all shook hands, and I left. The lesson in justice *and* etiquette was over.

Questions, Facts . . . and a Solution

In our society, in which the social causes of crime have long since been eliminated, where do thieves, hooligans, parasites and other lawbreakers come from? . . . .

In our country there are no professional criminals who have chosen conscious, deliberate self-enrichment at society's expense as their goal in life. Soviet legal science rightly refutes the hypotheses of certain bourgeois scholars about "congenital criminality" and the inevitability of lawbreaking. After all, each person in our country has an opportunity to labor and to earn his living in an honest way.

But in that case, it is asked, where do the lawbreakers come from? Practice shows that the majority of crimes are engendered by drunkenness, moral degeneracy, venality, and a desire for an easy, idle life. These vices are tenacious. And, most important, they are being passed along to certain young people. Therefore, the eradication of these vices must have the participation of parents, production collectives, the school—in brief, all those links on which a person's character formation depends.

This is not a simple task. After all, sometimes a lad appears to be respectable in the eyes of everyone he lives and studies or works with. No one notices anything suspicious. And suddenly—sometimes it is simply a mystery how such a person could commit a crime. But it takes no great effort to be surprised. It is more difficult to understand a person ahead of time. . . .

It is often asked when a young lad breaks the law: Where was the militia looking? And this is a logical question. Of course, the militia should always stand guard over public order and defend the interests of citizens. But for some reason people very seldom ask: Where were the collective, the comrades at work, the parents and the neighbors looking? . . . .

There has been enough coddling of vicious criminals. As a matter of fact, measures of persuasion and public influence have no effect on some of them. Of course, we should not curtail upbringing work with people who have committed insignificant breaches of the law. But it is wrong not to apply the full force of the law in places where public persuasion by itself will not help. Our humaneness should be shown to those who have slipped for the first time and have recognized their error. In other cases it is necessary to act with all severity. This is what the working people in their letters demand of the agencies for safeguarding public order. . . .

The shaping of an adolescent's character is an intricate and difficult process. In our society, unfortunately, there are still loafers, self-seekers and parasites. There are embezzlers of public property, bribetakers, speculators and hooligans. They exert a poisonous influence on young souls. Therefore, the problem of the upbringing of the new man—the citizen of a Communist society—is indissolubly linked with the struggle against survivals of the past, against bourgeois ideology. . . .

—From "Responsible for All Things," by V. Tikunov, RSFSR Minister for Safeguarding Public Order, Izvestia, February 6, 1965.

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ERRATA

TO OUR READERS:

The following serious error appears on page 98 of this issue: The article "The Peasant" was written by Samuel, not by Alexander, Kucherov.

Also please note that the diagram on page 91 should be entitled "Comrades' Courts..." rather than "Comradely Courts..." The same mistake appears in the diagram proper.

The appearance of these errors is deeply regretted.

The Editors
PROBLEMS OF COMMUNISM

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